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No. ____

IN THE

Supreme Court of the United States

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *et al.*,

Petitioners,

v.

DELTA AIR LINES, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was it proper for the Eleventh Circuit to hold, in conflict with the decisions of this Court and of the Third, Sixth, and Tenth Circuits, that a court may order a labor union to halt employee conduct that the union has been found not to have sponsored, participated in, condoned or ratified but instead to have condemned?

2. Was it proper for the Eleventh Circuit to hold, in conflict with the Third, Sixth, and District of Columbia Circuits, that in an action governed by the Norris-LaGuardia Act ("NLGA"), 29 U.S.C. §§ 101 *et seq.*, a federal court has jurisdiction to issue a preliminary injunction despite material fact disputes as to which there has never been live testimony subject to cross-examination?

LIST OF PARTIES TO THE PROCEEDINGS

The Air Line Pilots Association, International, AFL-CIO ("ALPA"), the Delta Master Executive Council of ALPA, Charles Giambusso, Mark Moore and James Icenhour were defendants in the district court, appellees in the court of appeals, and are petitioners in this Court.

The following individuals were not before the district court at the time of the order appealed from; since that time they, as well as the petitioners in this Court, have answered as defendants in the district court: Derry R. Anderson, John Child, Robert Connell, Michael Cooper, Gary Cunningham, James Doyle, Chris Hayes, M.P. Holland, Joseph Houseman, Eric Janssen, Michael Jones, John Ley, Scott Martin, Brian McManus, Martin Meeker, Stephen Mills, Robert Morus, Tim O'Malley, Steve Shapard, Steve Simonis, Keith Simpson, Rick Smail, Winford Speakman, Sandra Stephens, Robert Stimpson, Jay Weatherman, Greg Werking, Randy Worrall, Charles Bless, Timothy Bohan, David Churan, Edward Driscoll, Ed Havrilla, James Kachadurian, Dean Marvin, Jon Matson, Gregg Mettler, Donald Moore, G.L. Morris, Charles Sargent, William Sawtelle, Scott Spears, G.K. Stewart, Larry Troyer, and James White. None of these individuals was an appellee in the court of appeals; none is a petitioner in this Court.

None of the petitioners or defendants is a corporation.

Delta Air Lines, Inc. was the plaintiff in the district court, appellant in the court of appeals, and is respondent in this Court.

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OPINIONS BELOW

The opinion of the court of appeals panel (App. 1a-23a) [1] is reported at 238 F.3d 1300 (11th Cir. 2001). The court of appeals' denial of rehearing *en banc* (App. 24a-25a) has not been reported. The opinion of the district court (App. 27a-45a) is reported at 123 F. Supp. 2d 1356 (N.D. Ga. 2000).

STATEMENT OF JURISDICTION

The judgment of the court of appeals panel was entered on January 18, 2001. App. 26a. A timely petition for rehearing *en banc* was denied on February 9, 2001. App. 24a-25a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves Section 2 First of the Railway Labor Act ("RLA"), 45 U.S.C. § 152 First, and Section 7 of the Norris-LaGuardia Act ("NLGA"), 29 U.S.C. § 107. Both statutory provisions are set out in the appendix. App. 46a-48a.

STATEMENT OF THE CASE

In a holding that conflicts with this Court's precedents and the holdings of other circuits, the court of appeals in this case directed the district court to order a union to halt employee conduct that the union did not sponsor, participate in, condone, or ratify, but in fact condemned. In reversing the district court's refusal to enjoin Petitioner Air Line Pilots Association ("ALPA") [2] at the request of Respondent Delta Air Lines, Inc. ("Delta"), the Eleventh Circuit's decision contravenes this Court's holdings that unions, like other

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[1] "App. ___" refers to the appendix annexed to this petition.

[2] In addition to ALPA, petitioners include ALPA's Delta Master Executive Council ("MEC") and the MEC's officers, Charles Giambusso, Mark Moore and James Icenhour.

membership organizations, can be held responsible only for their own wrongdoing, not the unauthorized acts of their members. Enjoining ALPA for the wrongdoing of others violates basic constitutional principles. It also stretches a union's obligations under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq.*, well beyond both that statute's text and any prior case law interpreting it, impermissibly requiring a union governed by the RLA to do whatever is necessary to end unauthorized, unratified employee conduct. In effect, the court of appeals decision forces a union to police employee conduct as an arm of management, a role completely alien to the labor relations scheme envisioned by the RLA and, indeed, all federal labor legislation.

In addition, in a holding that contravenes an express jurisdictional requirement of the NLGA, and that conflicts with those of other circuits, the Eleventh Circuit ordered that an injunction be entered against ALPA despite material disputed facts as to which there has never been live testimony or an opportunity for cross-examination. The court of appeals decision reduces Congress' jurisdictional mandate of a hearing with live testimony to nothing more than a discretionary rule of evidence that can be jettisoned if a court believes evidence to be sufficiently reliable. By judicial fiat, the decision makes optional an unambiguous jurisdictional requirement.

The Eleventh Circuit decision conflicts with this Court's jurisprudence and case law in other circuits, and should not be allowed to stand.

Facts and Proceedings Below

Since September 1999 (and through the date of the court of appeals decision), Delta and ALPA have been engaged in negotiations for a new collective bargaining agreement ("CBA"). App. 2a. Under the existing CBA, as the court of appeals recognized, pilot overtime flying is entirely

voluntary. App 2a-4a. The district court found that certain Delta pilots, although counseled not to do so by ALPA, engaged in concerted efforts to reduce overtime flying as a way to pressure Delta during contract negotiations. App. 29a, 30a.

Indeed, far from sponsoring these actions, ALPA, in the summer of 2000, "unanimously directed a recommendation" to the pilots that they meet Delta's aggressive flight schedule by flying "maximum overtime at premium rates." App. 34a. In November 2000, when some pilots were advising others not to fly overtime, ALPA responded by repeatedly advising the pilots, through letters, e-mails, website postings and telephone messages, that pilots should respect the choice of others on whether to fly overtime, that ALPA strongly opposed any concerted action on the matter of overtime, and that overtime decisions should not be used as a vehicle for concerted activity. *See* App. 38a-39a. Delta even recognized and expressed its appreciation for ALPA's efforts to curb pilot harassment related to any overtime efforts. App. 39a.

On December 5, 2000, Delta nonetheless sued ALPA under the RLA for an injunction to stop the anti-overtime efforts of some pilots. App. 6a.[3] At the preliminary injunction hearing held *the next day*, Delta charged that ALPA had sponsored the anti-overtime effort but presented its case against ALPA entirely through declarations and exhibits; neither on December 6 nor at any other point in this case has there been direct- or cross-examination of witnesses. Without adducing any competent evidence whatsoever concerning ALPA's ability to do more than it had already done, Delta also suggested that in order to make employees stop their alleged misconduct ALPA should be enjoined even if the district court were to find that the union had neither sponsored nor ratified the alleged misconduct. *See* App. 39a.

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[3] The district court's jurisdiction was invoked under 29 U.S.C. §§ 1331 and 1337.

The district court denied Delta's motion to enjoin ALPA. App. 41a. While finding that an "undisclosed" number of rank-and-file pilots were engaged in a campaign to discourage overtime flying (App. 29a), the court determined that "[n]either the Union leadership nor the present Delta Master Executive Council ('MEC') of ALPA supports this effort" (App. 30a) and that ALPA "has taken affirmative action not only to inform its members of the possible illegality of their action, but has taken action to discourage unlawful activity." App. 40a. The court stated that it would "not hold a union liable for the unilateral unlawful actions of its members without evidence indicating the union's involvement" nor would it "hold that a union has an affirmative duty to end or prevent the unilateral unlawful activity of its members, especially when there is no finding of involvement on the part of the union." *Id.*

A three-judge panel of the United States Court of Appeals for the Eleventh Circuit reversed and instructed the lower court to issue an injunction against ALPA. App. 22a-23a. The panel left undisturbed the lower court's findings that ALPA neither sponsored nor ratified a no-overtime campaign and in fact discouraged such a pilot campaign. App. 18a. But the panel nevertheless held that under Section 2 First of the RLA, 45 U.S.C. § 152 First, even if ALPA "has not sponsored or ratified the unlawful job action by the pilots, it has *a duty to end* such unlawful action." App. 19a, n.22 (emphasis added). The appeals court ordered that a preliminary injunction be entered despite the lack of a hearing with live testimony, even while acknowledging that "it is clear that [NLGA] section 107 [29 U.S.C. § 107] requires live testimony in order to obtain a temporary or permanent injunction in a labor dispute . . . ." App. 20a.

On February 14, 2001, following the Eleventh Circuit's denial of petitioners' *en banc* request and that court's issuance of the mandate, the district court entered a preliminary injunction against ALPA without further hearing.

REASONS FOR GRANTING THE WRIT

I. NO BASIS EXISTS FOR THE COURT OF APPEALS' UNPRECEDENTED HOLDING THAT ALPA HAS A DUTY TO END UNAUTHORIZED, UNRATIFIED EMPLOYEE CONDUCT

In this case a federal court of appeals ordered that an injunction should issue against a labor organization that did no wrong, in order to require that organization to end what the court regarded as misconduct *by others*. This Court, however, has repeatedly held that membership organizations, including unions, can be held responsible only for their own wrongdoing, not the unauthorized, unratified acts of their members. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 931 (1982), *Carbon Fuel Co. v. UMW*, 444 U.S. 212, 216 (1979); *Coronado Coal Co. v. UMW*, 268 U.S. 295, 304 (1925). This limitation on union liability rests on the due process clause of the United States Constitution, specifically the "cherished principle that one is tried for one's own deeds, and not for another's." *United States v. Lane*, 474 U.S. 438, 475 (1986); *see Claiborne Hardware*, 458 U.S. at 931 (limitation on organizational liability based in Constitution); *North American Coal Corp. v. Local Union 2262*, 497 F.2d 466 (6th Cir. 1974) (making unlawful employee conduct "automatically attributable to the union" is "repugnant to due process of law").

By contravening this principle, the Eleventh Circuit has also split from other circuits, which have consistently held that a union cannot be responsible for acts of its members which the union neither sponsored nor ratified. *See, e.g., Fry v. ALPA*, 88 F.3d 831, 842 (10th Cir. 1996) (union cannot be liable for unauthorized, unratified employee acts based solely on its failure "to stop such acts"); *Philadelphia Marine Trade Ass'n v. Local 1291, Int'l Longshoremen's Ass'n*, 909 F.2d 754, 758 (3d Cir. 1990) ("union can only be subject to injunctive relief when the picketing is attributable to it");

United Steelworkers v. Lorain, 616 F.2d 919, 921 (6th Cir. 1980) (union not "required to take affirmative action" to end unauthorized job action).

By holding that a union has a "duty to end" employee misconduct, even if the union neither sponsored nor ratified it and indeed affirmatively condemned it, the court of appeals imposed a standard on ALPA that approaches strict liability for employee conduct. Under prior Eleventh Circuit case law, a union, to avoid a finding of ratification, has to make clear efforts to stop the employee conduct. *See Prater v. UMW*, 793 F.2d 1201, 1210 (11th Cir. 1986); *U.S. Steel Corp. v. UMW*, 598 F.2d 363, 365 (5th Cir. 1979). Although the district court concluded that ALPA made such efforts and hence did not ratify a no-overtime campaign (*see* App. 30a), and the court of appeals did not disturb this finding (*see* App. 18a), the court of appeals held this was not enough, and that ALPA had a duty to take additional measures to "end" any pilot anti-overtime campaign. *See* App. 19a, n.22.

This extreme standard, exceeding even the standard needed to avoid ratification, is particularly misplaced in a case like this, involving voluntary overtime. Under the Eleventh Circuit's decision, to avoid an injunction ALPA has to try to require pilots to volunteer for work they are individually under no obligation, contractual or otherwise, to perform, and in sufficient numbers to satisfy Delta and the court. No prior legal authority exists to so press a union into service as the enforcement arm of management.

Nothing in the RLA supports the Eleventh Circuit's decision. RLA Section 2 First requires the parties to "exert every *reasonable effort* to make and maintain agreements." *See Chicago & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 571 n.1 (1971) (emphasis added); it bars a union during contract negotiations from itself disturbing the status quo, *see Brotherhood of R.R. Trainmen v. Jacksonville Terminal*, 394 U.S. 369, 378 (1960), an obligation ALPA fulfilled. But Section 2 First nowhere requires a union to

"end" unauthorized employee activity that the union has already condemned, or makes a union responsible for the unauthorized, unratified acts of others. Indeed, in *every* prior RLA case granting an injunction against a union over the union's objection, the union was found to have instigated, encouraged or been otherwise involved in the employee job action. *See, e.g., American Airlines v. APA*, 160 L.R.R.M. (BNA) 2459 (N.D. Tex. 1999); *Metro-North Commuter R.R. v. Local 808, IBT*, 114 Lab. Cas. (CCH) ¶ 11,948 (S.D.N.Y. 1989); *National R.R. Passenger Corp. v. Brotherhood of Locomotive Eng'rs*, 113 Lab. Cas. (CCH) ¶ 11,766 (D.D.C 1989). The Eleventh Circuit decision is the only case granting an injunction over a union's objection despite a specific finding of fact that the union neither sponsored nor ratified the employees' action and indeed told the employees it opposed the action.[4]

The decision of the court of appeals also contravenes the plain language of Section 7(a) of the NLGA, which only permits an injunction against a union engaging in unlawful conduct or "actually authorizing or ratifying the same." 29 U.S.C. § 107(a). While acknowledging that the NLGA "generally prohibits a court from holding a union responsible for illegal acts of the union members" (App. 10a), the Eleventh Circuit held that RLA Section 2 First "takes precedence." App. 13a. Nothing in the language of RLA Section 2 First, however, imposes responsibility on a union for unauthorized employee conduct and, as this Court has held, "with the choice between the ambiguity in the RLA and the unambiguous mandate of the [NLGA]," the latter governs. *Burlington N.R.R. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 447 (1987). Indeed, this Court has

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[4] In *National Airlines v. International Ass'n of Machinists*, 416 F.2d 998 (5th Cir. 1969), relied upon by the court of appeals (App. 17a), the issue was a carrier's right to fire employees who engage in an unlawful sit-down strike. The union conceded that an injunction was appropriate. *Id.* at 1001.

warned, as though in anticipation of the Eleventh Circuit's decision, that "the vagueness of the obligation under § 2 First could provide a cover for freewheeling judicial interference in labor relations of the sort that called forth the Norris-LaGuardia Act in the first place." *Chicago & N.W. Ry. Co.*, 402 U.S. at 583.

Because the decision of the court of appeals so far departs from accepted constitutional law and labor law doctrine as to rewrite basic principles, and because it creates a split with other circuits, it warrants this Court's review.

II. THE COURT OF APPEALS DECISION VIOLATES THE PLAIN JURISDICTIONAL LIMITS ON THE FEDERAL COURTS IMPOSED BY CONGRESS

In Section 7 of the NLGA, Congress withdrew from the federal courts any *jurisdiction* to issue an injunction in a labor dispute "except after hearing the testimony of witnesses in open court (with opportunity for cross-examination)." 29 U.S.C. § 107. Despite the plain language of the statute the Eleventh Circuit, in an act of pure judicial fiat, read this jurisdictional bar as optional, and instructed the district court to order an injunction without there ever having been a hearing with live testimony and the opportunity for cross-examination. By doing so, the appeals court did violence to the "venerable principle that if the language of a statute is clear, that language must be given effect." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring). It also created a split with the holdings of other circuits. *See United Tel. Workers v. Western Union*, 771 F.2d 699, 703 (3d Cir. 1985) (court without jurisdiction to issue injunction without holding hearing with testimony); *In re District No. 1—Pacific Coast Dist., Marine Eng'rs Beneficial Ass'n*, 723 F.2d 70, 77 (D.C. Cir. 1983) (court lacked jurisdiction to issue an injunction when no testimony heard: "A district court

has no *jurisdiction* under the Norris-LaGuardia Act to issue a labor injunction without adhering to the explicit terms of the Act.") (emphasis in original); *UAW v. LaSalle Mach. Tool, Inc.*, 696 F.2d 452, 456 (6th Cir. 1982) ("Only after it has heard the testimony of witnesses in open court . . . does a federal court have jurisdiction to issue an injunction . . .").

In effect, the Eleventh Circuit downgraded NLGA Section 7 from a jurisdictional requirement to a rule of evidence, holding that NLGA Section 7 "is not so much about requiring *live* testimony . . . as it is about ensuring the presence of reliable evidence." App. 20a (emphasis in original). Indeed, the appeals court expressly analogized NLGA Section 7 to the hearsay rule. App. 22a. The hearsay rule, however, contains an express exception, making admissible out-of-court statements that are sufficiently trustworthy. *See* FED. R. EVID. 807. NLGA Section 7, by contrast, contains no such exception, and because it is a jurisdictional and statutory requirement, a court has no power to create one.

The Eleventh Circuit's nullification of the jurisdictional live testimony requirement was particularly egregious because the evidence taken by the district court—which the appeals court deemed sufficiently reliable as not to require live witnesses—did not form the basis for the injunction that the court of appeals deemed to be necessary. As the court of appeals acknowledged, "[t]he only material issue at the hearing was whether ALPA actively sponsored or ratified the pilots' no-overtime campaign." App. 21a. There was no testimony or cross-examination on the entirely separate, intensely fact-bound question that the appeals court subsequently found to be controlling: whether ALPA, under RLA Section 2 First's "every reasonable effort" standard, had made sufficient efforts to end the alleged misconduct by some individual pilots. App. 22a-23a. *See Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 721 (1999) (question of reasonableness essentially fact-bound). For example, no hearing with live testimony addressed whether and to what

extent ALPA could have affected the amount of voluntary overtime flying the pilots performed. Indeed, the total absence of evidence on this question forced the appeals court to admit the possibility "that ALPA has in fact done all that it can do . . ." App. 18a. Thus, ALPA was denied a hearing on the central factual issue on which the appeals court based its decision, even as the court of appeals *speculated* that ALPA might not have satisfied the court's newly-minted legal standard.

In creating its unsupportable re-writing of the NLGA, the court of appeals noted that the NLGA does not require live testimony for a temporary restraining order. App. 20a-22a. The court failed to mention, however, that under the statute a TRO cannot last more than five days, *see* 29 U.S.C. § 107, and did not instruct the district court to order a TRO limited in this way; it ordered that a preliminary injunction be entered. *See* App. 2a, 17a, 22a. NLGA Section 7 expressly requires a hearing with live testimony before a federal court has jurisdiction to issue such an injunction.

In the only case the Eleventh Circuit cited to support its holding, *Railway Express Agency, Inc. v. Brotherhood of Ry., Airline & S.S. Clerks,* 437 F.2d 388 (5th Cir. 1971) (*see* App. 21a-22a), the court held that the unions had waived oral testimony by witnesses. 437 F.2d at 395. Moreover, the crucial facts were stipulated by counsel. *See id.* The *Railway Express* court held that "[t]here was no violation of § 7 of the Norris-LaGuardia Act *under these limited circumstances*." *Id.* (emphasis added). Here, by contrast, ALPA neither stipulated to crucial facts nor waived the NLGA's live testimony requirement.

In sum, no hearing with live testimony took place, and no hearing at all took place on the issue on which the appeals court rested its decision—whether ALPA had done all it was required to do to discourage the conduct of individual pilots. The Eleventh Circuit erred in instructing the district court that it had jurisdiction to issue an injunction absent such a hearing. The court of appeals decision conflicts with both the clear language of the NLGA and cases from other circuits interpreting the NLGA. It should be set aside.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT
OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 00-16472
D.C. Docket No. 00-03207-CV-WBH-1

DELTA AIR LINES, INC.,
Plaintiff-Appellant,

versus

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(January 18, 2001)

Before TJOFLAT, BARKETT and MAGILL*, Circuit Judges.

TJOFLAT, Circuit Judge:

This case is before the court on Delta Air Lines' appeal of the district court's denial of a preliminary injunction against the Air Line Pilots Association. Because we find concerted action on the part of the pilots and because the Air Line Pilots Association has a duty under the Railway Labor Act, 45 U.S.C. § 152 First, to prevent such action, we reverse and

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* Honorable Frank J. Magill, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

remand to the district court with instructions to issue an appropriate injunction.

I.

A.

Delta Air Lines, Inc. ("Delta") and the Air Line Pilots Association, International ("ALPA") are parties to a collective bargaining agreement ("CBA") that governs the terms and conditions of employment for over 9,800 pilots employed by Delta.[1] Delta and ALPA commenced negotiations for a new CBA in September 1999. These negotiations are ongoing.

In the midst of these ongoing negotiations, Delta pilots began to decline to fly "overtime." Overtime is built into Delta's flight schedule, accounting for approximately five to seven percent of scheduled flights, and derives from the CBA.[2] "Overtime" is in some ways a misnomer, for this is really unscheduled "open time" on the flight schedule in which pilots may volunteer to fly additional flights above their pre-arranged flight schedule. Although Delta maintains a pool of reserve pilots to operate flights in the event a scheduled pilot is unavailable, it relies upon pilots to "pick up" these overtime flights in order for Delta to operate all of

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[1] Delta is a common carrier by air engaged in the transportation of passengers and freight in intrastate and interstate commerce throughout the United States. ALPA is a labor organization that is the exclusive bargaining representative of Delta's pilots.

[2] Under the current CBA, Delta schedules flights for public purchase, hires and trains pilots to operate those flights, places the flights in monthly pilot schedules that pilots bid to operate, maintains a number of "reserve pilots" to operate flights in the event that scheduled pilots become unavailable, and offers "open time" flights to pilots for flying as "overtime" above their schedule.

its scheduled flights.[3] A pilot has the right, under the CBA, to exercise his or her individual choice and decline to pick up overtime flights. Additionally, a pilot can avoid being

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[3] There are three kinds of "overtime" flights: White Slip, Green Slip, and Green Slip with Conflict. White Slip flying, the most common kind of overtime (an average of 6.77% of the total pilot credit hours per month from October 1, 1999 to September 30, 2000 were accounted for by white slip flying), is done at regular contract rates. Green Slip and Green Slip with Conflict are flown at premium rates, but do not reduce the availability of a particular pilot for overtime in subsequent months.

Pilots generally fly a monthly work schedule for which they have bid, according to their training on particular equipment and seniority. A number of pilots, usually between fifteen and twenty-five percent, are scheduled as reserves. Open time may be assigned to reserves, if they are available. Generally, though, open time flights are filled by pilots who voluntarily pick up open time; this increases a pilot's flight hours and income. Pilots who desire premium pay may choose to fly Green Slip rather than White Slip, which means that the pilot will only be called upon after all pilots with White Slips and reserves for that day have been used to fill vacancies. A pilot may also request to fly open time hours on a flight which conflicts with the pilot's pre-assigned schedule; this is Green Slip with Conflict. If this open time is awarded, then the pilot drops his or her originally scheduled trip but receives payment for both the pre-assigned trip and the trip actually flown.

Another method of flight staffing is "inverse assignment." Inverse assignment involves Delta contacting available and qualified pilots, in inverse order of seniority, to operate a flight. Inverse assignment duties pay premium (double) rates, and inverse assignment occurs only after Delta has exhausted all pilots volunteering for White Slips and Green Slips. Pilots often use answering machines or fail to answer their telephones, which limits the value of inverse assignment since a pilot may not be assigned unless he or she returns a call to Crew Scheduling. Inverse assignment with conflict works in the same way as regular inverse assignment, except that Delta calls upon pilots whose pre-assigned schedule will conflict with the proposed inverse assignment. Therefore, inverse assignment with conflict only occurs after Green Slips with Conflict, as well as all other methods of filling pilot vacancies, are exhausted.

assigned to operate overtime flights by exercising his or her CBA rights not to answer a telephone call and not to return a telephone call to Delta; pilots may not be assigned to overtime flying unless they have spoken with Crew Scheduling.

Although each individual pilot may make personal choices about how and whether to work overtime, Delta relies upon many of the pilots choosing to work this open time to fulfill its scheduled flights. If all of Delta's pilots were to refuse to pick up additional flights and refuse to work overtime, Delta would not be able to operate its full complement of flights. Although there are some alternatives available to Delta under the CBA, including raising the "cap" on pilot hours in a given month, staffing flights with reserves or management pilots, and pre-canceling flights and rebooking passengers in advance, these alternatives are limited and generally do not allow Delta to fly its full complement of scheduled routes.

Beginning in November 2000, apparently just in time for holiday travel, Delta pilots intensified their "no-overtime campaign."[4] This action by the pilots, viewed in the context of the holiday travel season and the ongoing labor negotiations between ALPA and Delta, leads to the obvious inference that the pilots are seeking to pressure Delta into making concessions in the negotiations for a new CBA.

The effects of the pilots' no-overtime campaign are evident from Delta's flight statistics. Historically, Delta cancels no more than one or two of 2,700 flights daily due to lack of pilots. However, in November 1999, pilots averaged 2,053 daily requests for overtime; in November 2000 they averaged only 1,276 daily requests. In the first three days of December

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[4] There is evidence in the record indicating that the pilots' actions had been ongoing since late summer, but the no-overtime campaign increased in intensity and resolve beginning in November.

1999, pilots averaged 1,678 daily requests; in those same days in December 2000 they averaged 503 requests. Delta canceled a total of ten flights due to pilot shortages for the month of November 1999, while it canceled 375 flights in November 2000. In the first three days of December 1999, Delta had no cancellations; in the first three days of December 2000 Delta canceled 386 flights.[5] Clearly, the pilots' efforts to refuse overtime is affecting both Delta's flight schedule and the traveling public.[6]

In the midst of the no-overtime campaign by the pilots, Delta tried to work with ALPA by enlisting ALPA's assistance in ending the pilots' concerted no-overtime campaign. During this time, ALPA issued a number of directives to the pilots advising them of their rights under the CBA regarding overtime; ALPA recommended flying overtime at premium rates—green slip flying. By November 2000, when some pilots were advising (and sometimes threatening) other pilots not to seek or fly overtime, the Delta Master Executive Council of ALPA ("MEC")[7] advised pilots several times, through several media, that pilots should respect the choices of others regarding overtime and that whether to fly overtime was the individual choice of each pilot. These steps by ALPA and the MEC had no measurable

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[5] Delta has submitted additional information indicating that over 1,200 flights were canceled between November 19, 2000 and December 10, 2000, and an additional 4,037 scheduled flights were canceled between December 11, 2000 and January 1, 2001 – all due to a lack of pilots.

[6] Delta's November 2000 cancellations affected 340,000 passengers who were booked on the canceled flights. The cancellations during the first three days of December 2000 affected an additional 30,000 passengers. Delta reports that an additional 375,000 passengers were affected by the cancellation of 4,037 scheduled flights from December 11, 2000 to January 1, 2001.

[7] The MEC is the governing body for Delta's ALPA-represented pilots.

effect on the pilots' no-overtime campaign. Delta was unable to overcome the no-overtime campaign either through compensatory scheduling methods or through ALPA's communications; therefore, Delta filed the present action.

B.

Delta filed a verified complaint on December 5, 2000 in the district court for the Northern District of Georgia. The complaint alleged an unlawful job action in violation of the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-188.[8] The complaint named fifty-one defendants, including ALPA, the MEC and its officers, and several individual pilots.[9] Delta filed motions for a temporary restraining order ("TRO") and a preliminary injunction on December 5. The district court held a hearing on Delta's motions for a TRO and preliminary injunction on December 6. The district court denied both motions on December 11. Delta filed its Notice of Emergency Appeal the following day, December 12. Delta also moved for an injunction pending appeal; we denied that motion on December 13. However, in that same order, we granted Delta's motion for an expedited appeal. Moving on the expedited basis, oral argument was heard on January 11, 2001.

II.

A.

The Railway Labor Act was passed in its initial form by Congress in 1926, with the support of both the railroads and the unions. Although a number of amendments have been

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[8] Delta is a common carrier by air under the terms of the RLA, 45 U.S.C. § 181. ALPA is the legal representative for Delta's pilots under the terms of the RLA, 45 U.S.C. § 152 Third.

[9] Delta also named one hundred "John Does" and one hundred "Jane Does" in its complaint.

introduced over the years, including extending the RLA to the airline industry in 1936, the stated purposes have remained constant. The first of the RLA's five listed purposes is "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein." 45 U.S.C. § 151a.[10] To accomplish its purposes, especially this first purpose, the RLA imposes a substantive duty upon "all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements . . . and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." 45 U.S.C. § 152 First. Because the statutory structure reveals that this duty is at the "heart" of the RLA, *see Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-78, 89 S. Ct. 1109, 1115, 22 L. Ed. 2d 344 (1969), and because of the legislative history of the provision,[11] the Supreme Court has clarified that section 152

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[10] Section 151a, in full, reads:

> The purposes of [the RLA] are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of [the RLA]; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

[11] In the House hearings on enacting this section of the RLA, Donald R. Richberg, counsel for the organized railway employees supporting the bill, stated plainly that section 152 First imposed a binding legal obligation on the parties. He stated, "it is [the parties'] legal duty to exert every reasonable effort . . . to settle all disputes, whether arising out of the abrogation of agreements or otherwise, in order to avoid any interruption

First imposes a legal duty enforceable by courts: "[W]e think it plain that [section 152 First] was intended to be more than a mere statement of policy or exhortation to the parties; rather, it was designed to be a legal obligation, enforceable by whatever appropriate means might be developed on a case-by-case basis." *Chicago & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 577, 91 S. Ct. 1731, 1735, 29 L. Ed. 2d 187 (1971).

The RLA sets forth a detailed sequence of steps that carriers and their employees (or their employees' representative) must undertake in negotiating collective bargaining agreements. The RLA intentionally provides for slow movements by all parties during this negotiation and bargaining process. As the Supreme Court has recognized, the RLA "subjects all railway disputes to virtually endless 'negotiation, mediation, voluntary arbitration, and conciliation.' " *Burlington N. R.R. Co. v. Bhd. of Maintenance of Way Employees*, 481 U.S. 429, 444, 107 S. Ct. 1841,

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to commerce. In other words, the legal obligation is imposed, and as I have previously stated, and I want to emphasize it, I believe that the deliberate violation of that legal obligation could be prevented by court compulsion." In further explaining why the provision applied equally in general terms to both parties in RLA cases, he explained:

> We believe, and this law has been written upon the theory, that in the development of the obligations in industrial relations and the law in regard thereto, there is more danger in attempting to write specific provisions and penalties into the law than there is in writing the general duties and obligations into the law and letting the enforcement of those duties and obligations develop through the courts in the way in which the common law has developed in England and America.

Hearings on Railroad Labor Disputes (H.R. 7180) before the House Committee on Interstate and Foreign Commerce, 69th Cong., 1st Sess., 91 (1926) (quoted in *Chicago & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 577, 91 S. Ct. 1731, 1735, 29 L. Ed. 2d 187 (1971)).

1850, 95 L. Ed. 2d 381 (1987) (quoting *Detroit & Toledo Shore Line R.R. Co. v. Transp. Union*, 396 U.S. 142, 148-49, 90 S. Ct. 294, 298, 24 L. Ed. 2d 325 (1969)). The bargaining procedures of the RLA are "purposely long and drawn out" in the hope that reason will, in time, produce an agreement. *Bhd. of Ry. and S.S. Clerks v. Fla. E. Coast Ry. Co.*, 384 U.S. 238, 246, 86 S. Ct. 1420, 1424, 16 L. Ed. 2d 501 (1966).

During the long negotiating process, the RLA seeks to protect the public, carriers, and unions alike by imposing a legal duty upon carriers and unions to maintain the *status quo* with respect to "rates of pay, rules, [and] working conditions," even when there is a disagreement about the CBA. 45 U.S.C. §§ 155-56; *Consol. Rail Corp. ("Conrail") v. Ry. Labor Executives' Ass'n*, 491 U.S. 299, 302-03, 109 S. Ct. 2477, 2480, 105 L. Ed. 2d 250 (1989).[12] A failure by either side to maintain the *status quo* during the bargaining and mediation process may give rise to injunctive relief, even without the customary showing of irreparable injury. *Id.; see also Detroit & Toledo Shore Line R.R. Co.*, 396 U.S. 142, 90 S. Ct. 294 (upholding a *status quo* injunction).

B.

In cases where a carrier seeks injunctive relief against a union, a court must look not only to the RLA, but also to the Norris-LaGuardia Act ("NLGA"), 29 U.S.C. §§ 101-115, to determine whether the court has jurisdiction. As a general rule, the NLGA prohibits courts from issuing injunctive relief in labor disputes.[13] 29 U.S.C. §§ 101, 104; *Int'l Ass'n of*

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[12] These *status quo* provisions of the RLA have been described by the Court as "central to its design." *Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142, 150, 90 S. Ct. 294, 299, 24 L. Ed. 2d 325 (1969).

[13] A "labor dispute" under the NLGA "includes any controversy concerning terms or conditions of employment, or concerning the

Machinists v. Street, 367 U.S. 740, 772, 81 S. Ct. 1784, 1802, 6 L. Ed. 2d 1141 (1961) ("The [NLGA] expresses a basic policy against the injunction of activities of labor unions."). The NLGA also generally prohibits a court from holding a union responsible for illegal acts of the union members. 29 U.S.C. § 107(a) ("[N]o injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the . . . organization making the threat or committing the unlawful act or actually ratifying the same after actual knowledge thereof."); 29 U.S.C. § 106 ("No . . . organization shall be held responsible or liable . . . for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."). The NLGA also prescribes procedural rules for civil proceedings in which an employer seeks an injunction or TRO against its employees. For an injunction, live testimony with opportunity for cross-examination is normally required after proper notice; for a TRO, though, sworn affidavits may suffice if the complainant would suffer "substantial and irreparable injury" without the TRO. 29 U.S.C. § 107.

C.

The Supreme Court has stated that although the prescriptions and proscriptions of the NLGA are clear, the NLGA "cannot be read alone in matters dealing with railway

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association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relationship of employer and employee." 29 U.S.C. § 113(c). The Supreme Court has explicitly held that the NLGA covers the railroads, *see Burlington N. R.R. Co. v. Bhd. of Maintenance of Way Employees*, 481 U.S. 429, 440, 107 S. Ct. 1841, 1848, 95 L. Ed. 2d 381 (1987), and therefore, by extension, the airlines.

disputes." *Bhd. of R.R. Trainmen v. Chicago River & Ind. R.R. Co.*, 353 U.S. 30, 40, 77 S. Ct. 635, 640, 1 L. Ed. 2d 622 (1957). Rather, "[t]here must be an accommodation of [the NLGA] and the [RLA] so that the obvious purpose in the enactment of each is preserved." *Id.*[14] The way to accommodate these two statutes, in most circumstances, is to determine if specific provisions of the RLA are implicated. If so, "the specific provisions of the [RLA] take precedence over the more general provisions of the [NLGA]." *Id.* at 42, 77 S. Ct. at 641; *accord Pittsburgh & Lake Erie R.R. Co. v. Ry. Labor Executives' Ass'n*, 491 U.S. 490, 513, 109 S. Ct. 2584, 2598, 105 L. Ed. 2d 415 (1989).

When a specific provision of the RLA is implicated, "the District Court has jurisdiction and power to issue necessary injunctive orders [to enforce compliance with the requirements of the RLA] notwithstanding the provisions of the [NLGA]." *Bhd. of R.R. Trainmen v. Howard*, 343 U.S. 768, 774, 72 S. Ct. 1022, 1025, 96 L. Ed. 1283 (1952); *see also Chicago & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 91 S. Ct. 1731, 29 L. Ed. 2d 187 (1971) (holding that 45 U.S.C. § 152 First creates a legal obligation which a court may enforce through injunction, notwithstanding section 4 of the NLGA (29 U.S.C. § 104)); *Chicago River*, 353 U.S. at 42, 77 S. Ct. at 641 (holding that injunctive relief is appropriate under the RLA when a specific provision is implicated,

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[14] According to the Supreme Court, the two Acts have different purposes. On the one hand, "[i]n adopting the Railway Labor Act, Congress endeavored to bring about stable relationships between labor and management in this most important national industry." *Chicago River*, 353 U.S. at 40, 77 S. Ct. at 640. It did this because disputes between labor and management "had resulted in the aggregate being serious enough to threaten disruption of transportation." *Id.* On the other hand, "[t]he Norris-LaGuardia Act . . . was designed primarily to protect working men in the exercise of organized, economic power, which is vital to collective bargaining." *Id.*

notwithstanding the general provisions of the NLGA); *Virginia Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 549-52, 57 S. Ct. 592, 600-02, 81 L. Ed. 789 (1930) (holding that injunctive relief is proper under the RLA).[15] Although the NLGA usually deprives federal courts of jurisdiction in general categories of labor disputes,[16] federal courts retain

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[15] Appellee cites two circuit court cases purportedly on point regarding the relationship or the RLA and the NLGA. *See Fry v. Airline Pilots Ass'n, Int'l*, 88 F.3d 831, 841-42 (10th Cir. 1996) (holding that the union could not be held liable for damages in state tort law claim for the alleged harassment of pilots who had worked through a strike without a showing of actual union authorization or ratification); *Airline Pilots Ass'n Int'l v. United Air Lines*, 802 F. 2d 886, 905-06 (7th Cir. 1986) (stating in dicta that the airline's evidence of a "sickout," using only statistical evidence and without identifying even one pilot who had taken sick leave without actually being sick, was insufficient to show a *status quo* violation at all, and therefore "would generally end the discussion"). We find these cases to be inapposite.

[16] 29 U.S.C. § 104 provides:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
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> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
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> (b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;
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> (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;
>
> (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in,

jurisdiction "to enjoin compliance with various mandates of the [RLA]." *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 772, 81 S. Ct. 1784, 1802, 6 L. Ed. 2d 1141 (1961). However, this exception for the RLA is limited, and an injunction usually may lie only if, in addition to violation of a specific principle of the RLA, an injunction is the sole practical, effective means of enforcing the Act. *See Burlington N. R.R. Co. v. Bhd. of Maintenance of Way Employees*, 481 U.S. 429, 446, 107 S. Ct. 1841, 1851, 95 L. Ed. 2d 381 (1987).

It is clear that the substantive legal duty of 45 U.S.C. § 152 First, is a "specific provision" of the RLA and, moreover, is central to the purpose and functioning of the RLA. Therefore, the provision takes precedence over the more general provisions of the NLGA. This is not to say that the procedural standards of the NLGA do not apply, but only that the substance of the RLA is controlling. We therefore hold that when this specific provision of the RLA is implicated and there is no other effective way to enforce the RLA, the NLGA

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or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

does not prohibit a federal court from issuing an appropriate injunction.

III.

A.

Contrary to ALPA's assertion, we hold that the district court had jurisdiction to hear the initial complaint: It did not arise from a "minor dispute," which would have rendered it subject to mandatory and exclusive arbitration under the RLA.[17] We reject ALPA's contention that the CBA "arguably" allows *all* pilots to refuse to work overtime, when

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[17] "Minor disputes" are disputes over grievances or the interpretation or application of agreements under the RLA. *Consol. Rail Corp. ("Conrail") v. Ry. Labor Executives' Ass'n*, 491 U.S. 299, 302-07, 109 S. Ct. 2477, 2480-83, 105 L. Ed. 2d 250 (1989). Exclusive jurisdiction over minor disputes rests with the system adjustment board. *See id.* at 303-04 and 304 n.5, 109 S. Ct. at 2481 and 2481 n.5; *Pyles v. United Air Lines, Inc.*, 79 F.3d 1046, 1049-50 (11th Cir. 1996). A decision of the appropriate system adjustment board with respect to an issue of interpretation or application of a collective bargaining agreement is final and binding on the parties in almost all circumstances. *See Conrail*, 491 U.S. at 303-04, 109 S. Ct at 2481.

"Major disputes," by comparison, concern the formation or modification of collective bargaining agreements. *See Elgin, Joliet & E. Ry. v. Burley*, 325 U.S. 711, 723-24, 65 S. Ct. 1282, 1289-90, 89 L. Ed. 1886 (1945). Conduct that affects the *status quo* of a pre-existing agreement is a major dispute for purposes of the RLA, and is properly brought before a federal court rather than a system adjustment board. *See Conrail*, 491 U.S. at 302-03, 109 S. Ct. at 2480.

If the conduct giving rise to an alleged *status quo* violation is arguably permitted by the CBA, the resulting dispute is a minor dispute, because it involves interpretation of the CBA. *See id.* at 307, 109 S. Ct. at 2483 ("Where an employer asserts a contractual right to take the contested action, the ensuing dispute is minor if the action is arguably justified by the terms of the parties' [CBA]. Where, in contrast, the employer's claims are frivolous or obviously insubstantial, the dispute is major.").

it is clear industry practice to structure flight schedules with "open time" built in. The only reasonable explanation for this customary practice is an expectation that not all of the pilots will choose to refrain from working overtime at the same time; this is implicit in the CBA. Further, this dispute centers on 45 U.S.C. § 152 First, which imposes a statutory obligation "to exert every reasonable effort to make and maintain agreements." This clear statutory provision is at the heart of the RLA and is clearly within the province of the federal courts to enforce. When the public interest, commerce, and a clear statutory provision are implicated, we will not shy away from holding the parties to their duties under the RLA so as to avoid "any interruption to commerce." 45 U.S.C. § 152 First.

B.

This is an appeal from the denial of a preliminary injunction. We have jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1292, which permits appeals from interlocutory orders of district courts "granting, continuing, modifying, refusing or dissolving injunctions." We generally review a denial of preliminary injunctive relief on an abuse of discretion standard. *Siegel v. LePore*, ___ F.3d ___, No. 00-15981 (11th Cir. Dec. 6, 2000).[18] We note that in RLA cases

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[18] A district court may grant preliminary injunctive relief only if the moving party shows four things:

> (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest.

Siegel v. Lepore, ___ F.3d ___, No. 00-15981 (11th Cir. Dec. 6, 2000). The district court, had it properly applied the law, would have found that Delta met all four of these factors. The substantial likelihood of success on the merits is discussed *infra* Part III.C. Irreparable injury surely would

a carrier need not show irreparable injury, a usual prerequisite for obtaining an injunction, to enjoin a violation of the *status quo* because of the strong public interest in enforcing the RLA. *See Conrail*, 491 U.S. at 303, 109 S. Ct. at 2480. However, even if we were to look at the traditional factors for a preliminary injunction, we would still review *de novo* the district court's application of the law. *Haitian Refugee Ctr. v. Baker*, 949 F.2d 1109, 1110 (11th Cir. 1991) (per curiam) ("[I]f the trial court misapplies the law we will review and correct the error without deference to that court's determination."); *see also Cuban American Bar Ass'n v. Christopher*, 43 F.3d 1412, 1423-24 (11th Cir. 1995) ("[T]he district court misapplied the law governing the issues presented in this case. Thus, we accord no deference to the district court's determinations in granting the preliminary injunctions in this case."). Because we find that the district court misapplied the law in the instant case by failing to recognize the extent of ALPA's duty under 45 U.S.C. § 152 First, we accord no deference to the district court's misapplication of the law.

C.

The district court erred in failing to appreciate the depth and seriousness of the duty to "make and maintain agreements" in a way so as "to avoid any interruption to commerce or to the operation of any carrier." 45 U.S.C. § 152 First. In the instant case, our focus is on ALPA's duty

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be suffered by Delta by canceling a number of flights, losing customer goodwill, and losing revenues (although a showing of irreparable injury is not actually required under *Conrail*, 491 U.S. at 303, 109 S. Ct. at 2480). There is no threatened injury to the non-movant by the issuance of an injunction. Finally, the injunction furthers the public interest by insuring the continued operation of air travel on a major carrier.

to maintain agreements to avoid interruption of commerce.[19] As the Supreme Court has stated, this language of the RLA creates a substantive legal duty "enforceable by whatever appropriate means might be developed on a case-by-case basis." *Chicago & N.W. Ry. Co.*, 402 U.S. at 577, 91 S. Ct. at 1735. An injunction is an appropriate remedy to compel the performance of this legal duty. *See Nat'l Airlines, Inc. v. Int'l Ass'n of Machinists & Aerospace Workers*, 416 F.2d 998 (5th Cir. 1969) (approving of an injunction against the union to issue directives to its members to restore the status quo when union members were engaging in unlawful "wildcat" strikes).[20]

The district court made explicit findings that there was an "ongoing concerted effort on the part of some Delta pilots to refuse overtime work." In its "Findings," the district court analyzed the number of canceled flights and pilots' reduced requests for overtime and found that "the statistics differ so substantially that the difference can only be explained by the efforts of an undisclosed number of pilots to undermine contract negotiations, seeking leverage for a salary increase." The court did not rest solely on statistical evidence, though, but looked to other evidence, including e-mails, "many of

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[19] This section of the RLA imposes the same duty upon employees. 45 U.S.C. § 152 First. The obvious implication from this is that Delta pilots may not collectively disrupt Delta's flight operations, in contravention of the CBA, by instituting a disruption in Delta's operations by way of a no-overtime campaign. The district court found that such an unlawful no-overtime campaign was occurring and properly applied this provision of the RLA against the pilots. The district court did not enjoin individual pilots, though, and thereby did not seek judicially to enforce this clear provision of the RLA.

[20] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

which rise to the level of intimidation and harassment." The court found that the "traveling public" and Delta are both harmed by the pilots' concerted activity:

> This reduction in requests for overtime is causing harm to Delta and the traveling public. Delta has lost millions of dollars in revenues, rerouting expenses, extra operating costs, and overnight hotel and meal vouchers. Additionally, Delta has suffered loss in the form of good will and traffic that is immeasurable. The public has suffered loss in time and money from the delays and cancellations which is also immeasurable.

In spite of these findings, the court refused to issue an injunction against ALPA and/or MEC. It based this refusal on the fact that "[n]either the Union leadership [of ALPA] nor the [MEC] supports this effort [by the pilots] and both have, in fact, counseled against it." While it is true that ALPA and the MEC "counseled against" the efforts of the pilots, it is equally clear that these union communiques were not effective in suppressing the pilots no-overtime campaign.

The district court's error came in its decision that it would "not hold that a union has an affirmative duty to end or prevent the unilateral unlawful activity of its members." The RLA imposes such a duty on the union in section 152 First, and the district court should have enforced that duty. It is possible, of course, that ALPA has in fact done all that it can do in directing the pilots to cease their no-overtime campaign. We seriously doubt this is the case, however. What seems to be true is that while ALPA has admonished its members at Delta's request, it has not made "every reasonable effort" as required by statute. 45 U.S.C. § 152 First. ALPA is statutorily bound to do everything possible to "maintain" the CBA so that commerce is not in any way interrupted. We are

not satisfied that ALPA has fulfilled this duty.[21] Therefore, the district court, on remand, should enjoin ALPA to take specific steps aimed at stopping the pilots' no-overtime campaign and resuming normal operations of Delta's operations, including its overtime scheduling.[22]

It is possible, although unlikely, that ALPA has lost control of its members and that the pilots are truly acting contrary to ALPA's wishes and directives. If this proves to be the case (which would become evident if the district court's injunction against ALPA is ineffective at stopping the no-overtime campaign), then *National Airlines, Inc. v. International Ass'n of Machinists & Aerospace Workers*, 416 F.2d 998 (5th Cir. 1969), would apply. In *National Airlines*, the union had lost control of its members (and conceded as much to the court) and the members were conducting "wildcat strikes"; the union was admittedly powerless to prevent this. In this circumstance, the airline came to the court seeking permission to terminate some of the employees if they failed

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[21] *See Pan American World Airways, Inc. v. Indep. Union of Flight Attendants*, 93 Lab. Cas. ¶ 13,307 (S.D.N.Y. 1981) (holding that an injunction should issue against the union where the evidence showed that the union was encouraging "or at least failing to discourage" a sickout in violation of the union's duty under the RLA, 45 U.S.C. § 152 First); *Trans World Airlines, Inc. v. Int'l Ass'n of Machinists and Aerospace Workers*, 87 L.R.R.M. (BNA) 2556, 75 Lab. Cas. ¶ 10,312 (W.D. Mo. 1974) (holding that the union had failed to meet its duty under the RLA, 45 U.S.C. § 152 First, where the union did not authorize unlawful activity by employees but did not take affirmative "reasonable" efforts to end such activities by the union members).

[22] Because we agree with the district court that the individual pilots are making a concerted, collective effort to reject overtime and institute an unlawful disruption of Delta's operations, we need not rule on whether ALPA has ratified the pilots' actions and is therefore directly responsible for the no-overtime campaign. The duty of ALPA under the RLA is sufficiently high that even if it has not sponsored or ratified the unlawful job action by the pilots, it has a duty to end such unlawful action.

to work under the terms of their CBA. (The airline approached the court because the RLA would not have permitted the airline's self-help without judicial intervention.) In *National Airlines*, the former Fifth Circuit allowed the airline, faced with employees who were violating the CBA and a union that had lost control of its members, to take direct action against the employees.

If ALPA cannot control the pilots, some of whom are admittedly violating the CBA by advocating concerted action, then Delta may return to the district court for additional relief. The district court would, at that point, join all appropriate parties as defendants (presumably *sua sponte*) and enjoin them from engaging in continued activity in violation of the CBA, under penalty of court sanction or other adverse employment action.

D.

Because the general procedural provisions of the NLGA still apply to this action, even though the anti-injunction portion of the NLGA does not, we must address the hearing before the district court. ALPA complains that Delta did not put on live testimony, with opportunity for cross-examination, as required by the NLGA, 29 U.S.C. § 107. While it is clear that section 107 requires live testimony in order to obtain a temporary or permanent injunction in a labor dispute, section 107 also provides alternate hearing requirements for a complainant to obtain a TRO. A TRO may be obtained to remedy "substantial and irreparable injury" on the basis of testimony under oath sufficient to justify the court's issuance of the TRO. 29 U.S.C. § 107. Reading the TRO and injunction provisions together, the purpose of section 107 is not so much about requiring *live* testimony, then, as it is about ensuring the presence of reliable evidence before a court may enjoin parties to a labor dispute.

In the instant case, although Delta did not put on live testimony, both sides presented sworn affidavits and a host of other evidence and testimony.[23] This evidence was largely undisputed—particularly as it related to the fact that the pilots were undertaking concerted action. ALPA's counsel conceded at the hearing that injunctive relief would be proper if Delta's pilots were engaged in concerted activity that violated the *status quo*; the district court did not hesitate to make explicit its finding of such concerted activity by the pilots in its dispositive order, and even in its closing comments at the hearing itself. Delta's evidence consisted of (1) written documents reflecting the pilots' overtime boycott (mainly in the form of captured e-mail communications); (2) union pronouncements and directives, which were concededly authentic; (3) statements of union members acknowledging the existence of the overtime boycott, which were concededly genuine; and (4) statistical evidence of the impact of the ban, which was not challenged by ALPA. ALPA presented its own documentary evidence, as well as relying upon some of the evidence presented by Delta. The only material issue at the hearing was whether ALPA actively sponsored or ratified the pilots' no-overtime campaign.

Given that there was no dispute about the reliability of the evidence, at least as to the concerted action by the pilots, we believe the district court was entitled to rely upon such evidence to make its determinations.[24] *See Ry. Express Agency, Inc. v. Bhd. of Ry., Airline & S.S. Clerks, Freight*

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[23] Delta offered to put on its declarants as live witnesses, but the district court decided to proceed without live testimony.

[24] We do not pass judgment at this time as to whether there was reliable and undisputed evidence about ALPA's involvement in the no-overtime campaign. There appears to be a genuine dispute over ALPA's involvement sufficient to necessitate live testimony as contemplated by the NLGA, 29 U.S.C. § 107.

Handlers, 437 F.2d 388, 395 (5th Cir. 1971) (holding that section 107 was not violated when the district court used only briefs and affidavits to decide whether to issue an injunction; live testimony with cross-examination was not required). The purpose of section 107 is served if the evidence is inherently reliable and there is no harm to the parties. An analogy to the hearsay rule demonstrates the propriety of this holding. Hearsay statements are generally excludable because they suffer from a lack of reliability; reliability is generally established through live testimony and cross-examination. However, there are exceptions to the hearsay rule that do not contravene the Confrontation Clause, even though they permit the introduction of out-of-court statements, because the statements are inherently reliable.

IV.

The district court properly determined that Delta's pilots were engaged in an unlawful no-overtime campaign. However, the district court improperly interpreted the gravity and depth of ALPA's duty under the RLA to prevent such an unlawful job action. Because there has been no showing that ALPA lacks control over the pilots, reason dictates that ALPA has not done enough to fulfill its statutorily mandated duty to "maintain" the agreement and avoid an "interruption to commerce." Upon remand, the district court shall issue appropriate injunctive relief directing ALPA to take further steps to end the pilots' no-overtime campaign. Further steps may include issuing directives as drafted by the court and threatening (or imposing) union sanctions for violations, as permitted by ALPA's constitution.[25] If ALPA complies with

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[25] ALPA's constitution permits the union to discipline, fire, or expel any member for a number of reasons, including "[a]cting in any manner to circumvent, defeat or interfere with collective bargaining between the Association and an employer or with existing collective bargaining agreements." ALPA Constitution and Bylaws, Art. VIII, Sec. 1.A.

the court's orders and the no-overtime campaign continues, Delta may return to the district court for injunctive relief against individual pilots, as discussed *supra* Part III.C.

REVERSED and REMANDED, with instructions.

BARKETT, Circuit Judge, concurring specially, in which MAGILL, Circuit Judge, joins:

I concur in the determination that under the law ALPA has an affirmative duty to exert every reasonable effort to prevent or stop the unilateral unlawful activity of its members and that it has not fulfilled that duty. Accordingly, I agree that this case should be remanded for the entry of an appropriate injunction requiring ALPA to take all reasonable steps to do so. However, any discussion of possible actions based on the possibility that ALPA cannot control its membership is premature.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Feb 9, 2001]

No. 00-16472-BB

DELTA AIR LINES, INC.,
Plaintiff-Appellant,

versus

AIRLINE PILOTS ASSOCIATION INTERNATIONAL, *et al.*,
DELTA MASTER EXECUTIVE COUNSEL OF ALPA, CHARLES GIAMBUSSON, MARK MOORE, JAMES ICENHOUR, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion ___,11th Cir., 19___,F.2d___)

Before: TJOFLAT, BARKETT and MAGILL,* Circuit Judges

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

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* Honorable Frank J. Magill, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

Entered for the court:

/s/ Illegible

UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Jan 18, 2001]

No. 00-16472
District Court Docket No. 00-03207-CV-WBH-1

DELTA AIR LINES, INC.,
Plaintiff-Appellant,
versus

AIRLINE PILOTS ASSOCIATION INTERNATIONAL, *et al.*,
DELTA MASTER EXECUTIVE COUNSEL OF ALPA, CHARLES GIAMBUSSON, MARK MOORE, JAMES ICENHOUR, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

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JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion, included herein by reference, is entered as the judgment of this Court.

Entered: January 18, 2001
For the Court: Thomas K. Kahn, Clerk
By: McCombs, Elaine

APPENDIX C

[Filed Dec. 11, 2000]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action File
NO. 1:00-CV-3207-WBH

DELTA AIR LINES, INC.,
Plaintiff,
v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *et al.*,
Defendants.

ORDER

Before the Court is Plaintiff, Delta Air Lines, Inc.'s ("Delta"), Motion for a Temporary Restraining Order ("TRO") and Preliminary Injunction. Delta moves the Court to enjoin and restrain the Air Line Pilots Association ("ALPA"), the individually named Defendants, and all others acting in concert with them from engaging in job actions, self-help or other violations of the status quo as defined and prohibited by the Railway Labor Act ("RLA"), 45 U.S.C. §§ 101 *et seq*. The alleged illegal activity includes a work slowdown, overtime ban including concerted refusals to accept premium time and/or special work assignments ("overtime" work), and other actions intended to cause added expense and/or disruption including increasing taxi-times and fuel burns.[1]

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[1] The Court notes here that the crux of Delta's Motion is the allegation regarding the refusal to accept voluntary overtime work. The only

The Court, having considered the Verified Complaint, Motion, declarations, and exhibits submitted in support of the TRO and Preliminary Injunction, the Memorandum and declarations submitted in opposition thereto, and having heard extended oral argument in open court, both in support of and in opposition to the granting of a TRO and Preliminary Injunction, makes the following

FINDINGS:

(1) Plaintiff Delta is a common carrier-by-air engaged in the transportation of freight and passengers in intrastate and interstate commerce throughout the United States. Defendant ALPA is a labor organization that is the exclusive bargaining representative of Delta's pilots. The individual Defendants are officers, representatives or subunits of ALPA, or members thereof.

(2) Delta and ALPA are parties to a collective bargaining agreement which sets forth the terms and conditions of employment for over 9,800 pilots employed by Delta. Delta and ALPA commenced their negotiations for a new agreement in September of 1999.

(3) Delta and ALPA have not yet exhausted the "purposely long and drawn-out" bargaining procedures mandated by the RLA. *Bhd. of Ry. and S.S. Clerks v. Fla. East Coast Ry. Co.*, 384 U.S. 238, 246, 86 S.Ct. 1420, 1424

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evidence Delta has presented regarding the other alleged illegal activity (*i.e.* work slowdown, increasing taxi-times and fuel burns), consists of suggestions made by individual pilots via e-mail inciting their cohorts to partake in this type of activity. Delta did not argue this point during the Hearing nor in their pleadings. Nor did Delta present any evidence that this type of "self-help" has actually occurred or that the Defendants were partaking in this activity. For this reason, the Court will only consider the present Motion as it pertains to the pilots' refusal to request voluntary overtime and DENY Delta's Motion as it relates to other alleged violations of the RLA.

(1966); 45 U.S.C. §§ 101 *et seq*. The parties are currently engaged in mediated bargaining and have jointly requested mediation through the National Mediation Board.

(4) There has been a substantial reduction in overtime requests since August of 2000. This reduction dramatically increased throughout November and the first days of December, 2000. The reduction has resulted in the cancellation of hundreds of flights which has seriously inconvenienced tens of thousands of passengers. When compared to the requests for overtime during the same months of 1999, the statistics differ so substantially that the difference can only be explained by the efforts of an undisclosed number of pilots to undermine contract negotiations, seeking leverage for a salary increase.

(5) An undisclosed number of pilots are actively encouraging, through e-mail and other means, the rejection of overtime opportunities. This "no-overtime" campaign has primarily been effectuated through e-mails, many of which rise to the level of intimidation and harassment. These communications include messages encouraging pilots not to respond to phone calls from Delta regarding inverse assignments. Not answering these calls effectively forecloses Delta' s ability to staff the flights that are normally staffed by the pilots electing to fly overtime but are suddenly electing not to.

(6) This reduction in requests for overtime is causing harm to Delta and the traveling public. Delta has lost millions of dollars in revenues, rerouting expenses, extra operating costs, and overnight hotel and meal vouchers. Additionally, Delta has suffered loss in the form of good will and traffic which is immeasurable. The public has suffered loss in time and money from the delays and cancellations which is also immeasurable.

(7) Neither the Union leadership nor the present Delta Master Executive Council ("MEC") of ALPA supports this effort and both have, in fact, counseled against it. The Delta MEC serves as ALPA's coordinating council for Delta pilots. Pilots at pilot bases are represented through ALPA Local Executive Councils ("LECs"), whose elected representatives constitute the Delta MEC.

ANALYSIS

A party seeking a preliminary injunction must establish the following four factors:

(1) a substantial likelihood of success on the merits, (2) a threat of irreparable injury, (3) that its own injury would outweigh the injury to the nonmovant, and (4) that the injunction would not thwart public interest. *Haitian Refugee Ctr., Inc. v. Baker*, 949 F.2d 1109, 1110 (11th Cir. 1991).[2]

I. Plaintiff's Motion

The Court will address Plaintiff's Motion by first considering the allegations against ALPA and then those against the individual defendants.

A. Injunctive Relief Against ALPA

Delta avers that ALPA has violated the RLA by encouraging its members to partake in an overtime ban including concerted refusals to accept premium time and/or

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[2] The parties dispute whether or not the Norris-LaGuardia Act ("NLGA"), 29 U.S.C. §§ 101 *et seq.*, applies to the current Motion. More specifically, Delta argues that the importance of the RLA in protecting the traveling public overrides the NLGA. The application of the NLGA would require clear and convincing evidence that ALPA actually authorized, participated in or, after actual knowledge, ratified unlawful conduct of its rank and file members as well as numerous other procedural barriers before any type of injunctive relief could issue. For the purposes of this Motion, the Court is satisfied that the moving party must, at the very least, make a showing of the four factors delineated above.

special (hereinafter collectively "overtime") work assignments. Delta argues that even if the evidence is not sufficient to show direct involvement by ALPA, there is sufficient evidence to show tacit approval by ALPA which is also a violation of the status quo provision of the RLA.

1. The RLA

A fundamental purpose of the RLA is "to avoid any interruption to commerce or to the operation of any carrier therein." 45 U.S.C. § 151(a)(l). Sections 5 and 6 of the RLA prohibit all forms of union "self-help," such as striking or engaging in "slowdowns" or "sickouts," until 30 days after the long procedure mandated by the RLA has been exhausted. *Consol. Rail Corp. v. Ry. Executives' Ass'n*, 491 U.S. 299, 303, 109 S.Ct. 2477, 2480 (1989). The RLA procedures are purposely long and drawn out in the hope that reason will, in time, produce an agreement. *Fla. East Coast Ry.*, 384 U.S. at 246. Section 2, First of the RLA states that parties to the collective bargaining process must:

> exert every reasonable effort to make and maintain contracts concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such contracts or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

45 U.S.C. § 152. The Supreme Court has stated that while these procedures are going on, the parties are to "maintain the status quo." *ConRail*, 491 U.S. at 302.

2. Evidence Presented

As proof of its contentions, Delta has presented the following evidence: (1) the overwhelming statistics confirming the drop in overtime requests, (2) an August 22, 2000, resolution from Local Council 47 of ALPA and a letter

from the Chairman of that branch dated October 11, 2000, (3) a letter from Mr. Giambusso, (4) an informative flyer produced by ALPA for its members regarding overtime flying, (5) e-mails and other communications from individual pilots.

Statistical evidence

Delta has submitted an overwhelming amount of statistical evidence that confirms that Delta pilots have dramatically decreased the number of requests they have submitted for overtime flights. For example, the evidence presented shows that while pilots had an average of 2,053 daily requests for overtime flights in November of 1999, they only averaged 1,276 in November of this year. In the first three days of December of 1999 they averaged 1,678 requests while only averaging 503 during those same days in December of 2000. The evidence also confirms that Delta has had to cancel a great deal of flights during this same time period. Delta canceled a total of 10 flights for the month of November 1999 while it canceled 375 flights during November of 2000. In the first three days of December of this year, Delta has already had to cancel 386 flights compared to the first three days of December 1999, when there were no cancellations.[3]

As stated in the Findings listed above, the Court finds that the statistical evidence presented illustrates a deviation that is so substantial, that it can only be explained by the efforts of an undisclosed number of pilots to undermine contract negotiations, seeking leverage for a salary increase and finds this to be credible evidence that an undisclosed number of pilots are engaging in an effort not to accept overtime work.

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[3] ALPA did point out that the first three days of December of 1999 were weekdays while the same dates of 2000 fell on the weekend which may account for some of the statistical deviation.

Local 47 minutes and letter

Delta presented as evidence the minutes from an August 22, 2000, meeting of Council 047, the Dallas-Fort Worth branch of ALPA, that includes a resolution resolving

> "that the pilots of Council 47 endorse a green-slip-with-conflict option and/or **no** overtime flying. This will give all pilots the opportunity for a period of relief from the excessive amounts that we have been doing for far too long" (emphasis in original).

Delta avers that this is direct evidence of ALPA's involvement in and encouragement of the overtime ban.

Delta also presents a letter dated October 11, 2000, from Daryle D. McGinnis, the Chairman for Council 047, sent to the pilots of that area that explains why the ALPA leadership is not partaking in an overtime ban. Delta presents the letter as evidence of what it views as ALPA's role in the current decline in overtime work: ALPA condemning such action publicly while privately encouraging pilots to participate. The letter states that there is no ALPA sponsored ban on overtime: "there is no MEC associated no-overtime flying . . . program." The letter explains that there is no ALPA sponsored ban because it is violative of the RLA. The letter emphasizes, however, that "there is of course a grassroots effort at . . . DFW," and suggests that the grassroots effort is legal as long as the union avoids any association with it. The letter recognizes that the August 22, 2000, resolution could be viewed as ALPA action in violation of the RLA and is careful to point out that the resolution

> was not one authorizing or establishing any . . . program but rather one telling the MEC that DFW *wanted* to do such a program. There is nothing illegal about wanting to do. That is hugely different from establishing a program. 'Endorsing' is not establishing, nor could any Local Council establish a program opposite direction anyway. (emphasis in original)

Letter from Mr. Giambusso and flyer from ALPA

Delta places a great amount of weight on a letter to ALPA members dated August 25, 2000, from Mr. Giambusso, Chairman of the Delta MEC. Delta argues that he uses "code words" to incite the overtime ban. Delta alleges that the Chairman of ALPA, by informing pilots of the manner in which they legally decline overtime work, encourages ALPA members to refuse to fly overtime. The letter, in its entirety states:

> Dear Fellow Pilot: Over the last year the Delta pilots have demonstrated their commitment and resolve to your union and our contract negotiation goals over and over again. Each time I have asked you to express your resolve to management, you have done so—and management has heard you. The May 2, 2000, informational picketing was a great success and I expect the upcoming rally on September 8 will be an even greater success. These efforts show how effective and powerful unity can be.
>
> Earlier this year, your local representative unanimously directed a recommendation to fly maximum overtime at premium rates. Once again, you came through. Lately, there has been some confusion resulting from individual communications. These are expressions of a lack of patience that seems to be growing within the pilot group. So there is no confusion, I have enclosed a copy of your MEC's unanimous direction on the subject of overtime flying. Until changed, this is what your union is asking you to do. Your continued solidarity and support is the most powerful and effective tool your leadership and Negotiating Committee can have to achieve the goals you set.

Delta characterizes this "disclaimer" and others like it as transparent and false. Delta argues that this letter and other

efforts on the part of ALPA pay lip service to the mandates of the RLA all the while it is sponsoring the ban. Delta claims ALPA is masking its participation in the overtime ban by describing it as "individual choices" or "grassroots" efforts. Delta also points to the "Contract Awareness" flyer attached to Mr. Giambusso's letter. This flyer, Delta contends, is a way for ALPA to say "an overtime ban is illegal" out of one side of its mouth while winking and saying "here is how to effectuate a ban if you choose to do so on your own initiative," out the other. The "Contract Awareness" flyer purports to educate the pilots about overtime flying and overtime pay.[4] The flyer explains the rules, regulations and procedures governing overtime flying and inverse assignments and recommends as follows:

> overtime flying is an individual decision, and no pilot should feel compelled to fly above the cap unless he or she desires to do so. Whether volunteering to fly overtime or being inversely assigned, every pilot should be aware of his or her absolute obligation not to fly when fatigue would prevent safe operation. . . . Your elected representatives recommend that a pilot who desires to work overtime does so for overtime pay, as most other Delta employees do.

The recommendation goes on to explain the pay rates associated with the different variations of overtime flying and suggests that pilots take advantage of pay above regular rates. Delta argues that this is an example of ALPA saying one thing while encouraging another. Delta claims that the flyer, using phrases such as "individual choice" and making a point to explain the legal manner in which pilots can avoid overtime work allows ALPA to publicly disapprove of the overtime ban while informing its members how to legally

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[4] Rather than reproducing the flyer in the body of this Order, the Court has attached the flyer in its entirety.

participate. Delta goes even further to argue that this informative flyer, when coupled with its timing and the numerous private communications currently being distributed actually acts to encourage the overtime ban.

Communications from individual pilots

Delta has presented numerous e-mails and other communications from individual pilots that directly encourage involvement in the overtime ban. The e-mails are explicit as to why the overtime ban is encouraged and how to effectuate it which includes ways to ensure that pilots are not available when Delta attempts to inversely assign flights to them. For example, one e-mail from Edwin Havrilla, a former MEC member, dated November 6, 2000, strongly encourages pilots to stop flying overtime immediately because of the timing of the ongoing negotiations (corresponding with Delta's counter proposal and preceding the filing for mediation) and the upcoming holidays, so that their actions will have the most impact.

As stated in the Findings listed above, the Court finds from this evidence that an undisclosed number of pilots are actively encouraging, through e-mail and other means, the rejection of overtime opportunities. This activity includes encouraging pilots not to respond to phone calls from Delta regarding inverse assignments.

3. Application of the RLA to the Present Case

(i) direct evidence indicating involvement by ALPA

There is no question that there is an ongoing concerted effort on the part of some Delta pilots to refuse overtime work and this Court recognizes that a campaign to ban overtime work or a concerted refusal to work overtime actively sponsored or promoted by a union may violate the RLA. *See ABX Air, Inc. v. Airline Professional Ass'n of the Int'l Bhd. of Teamsters,*

C-1-97-812 (W.D. Ohio Nov. 12, 1999). A careful review of the evidence presented, however, reveals that there is insufficient evidence to find that ALPA was directly involved in the overtime ban complained of herein. The only evidence of ALPA's direct involvement comes from the August 22, 2000, DFW Council of ALPA Resolution, resolving to ban all overtime work and a letter from the Chairman of that council acknowledging that there was an ongoing grassroots effort to ban overtime work. That resolution was explained in the letter from the Chairman of that Council to its members dated October 11, 2000. The letter explained that the resolution was merely expressing the desires of the Council 47 members, and was not the official position of the chapter. The letter also recognized that there was an ongoing grassroots campaign and speculated that it was "probably legal," but did not in any way promote it and, in fact, did nothing but disavow any official involvement in any such campaign. This evidence is insufficient to make a legal finding that ALPA was directly involved in any movement to ban overtime work. The finding that the evidence is insufficient to connect ALPA to the ban on overtime work is bolstered by the fact that the evidence indicates the ban on the overtime did not really start to take effect until November and December of 2000. It does not logically follow that if this resolution from August incited a ban on overtime work among ALPA members, as Delta would have this Court believe, that the ban did not take effect until November and December, at least three months later. Furthermore, the Court finds that the cases cited by Delta in support of the propositions that a union can be in violation of RLA because of the concerted effort of its members to exercise their right not to work overtime can be distinguished in that they all had evidence indicating direct involvement on the part of the union and some are further distinguished because they involved situations where the defendant unions refused to take any actions disavowing or discouraging the illegal action. *See, e.g., ABX Air, Inc., v. IBT*, C-1-97-812

(W.D. Ohio Nov. 12, 1999) ("refusal of defendant's members [pilots] to bid on open lines of flight [*i.e.*, refusal to work 'voluntary' overtime] constituted an illegal strike" under the RLA); *Metro-North Commuter R.R. v. Local 808, Teamsters*, 1988 U.S. Dist. LEXIS 10648, 114 Lab. Cas. (CCH) ¶ 11,948 (S.D.N.Y. Sept. 22, 1988) (concerted ban on overtime enjoined); *National R.R. Passenger Corp. v. BLE*, 1989 U.S. Dist. LEXIS 11804, 113 Lab. Cas. (CCH) ¶ 11,766 (D.D.C. Oct. 6, 1989) (engineers who refuse to perform training in violation of established practice are ordered to cease engaging in self-help before exhaustion of major dispute procedures); *Texas Int'l Airlines, Inc. v. ALPA*, 518 F.Supp. 203 (S.D. Tex. 1981) (injunction and contempt proceeding where union engaged in slowdown, excessive fuel burn, and sickout); *Pan Am. World Airways, Inc. v. IUFA*, 1981 U.S. Dist. LEXIS 13669, 93 Lab. Cas. (CCH) ¶ 13,307 (S.D.N.Y. Jul. 20, 1981) (injunction against slowdown); *Trans World Airlines, Inc. v. IAM*, 75 Lab. Cas. (CCH) ¶ 10,312 (W.D. Mo. 1974) (slowdown activity); *Pan Am. World Airways, Inc. v. TWU*, 1969 U.S. Dist. LEXIS 10864, 60 Lab. Cas. (CCH) ¶ 10,310 (S.D.N.Y. Aug. 8, 1969) (ten minute work stoppage, followed by slowdown, enjoined); *Long Island R.R. Co. v. BLE*, 290 F.Supp. 100 (E.D.N.Y. 1968) (spurious safety protest enjoined); *United Air Lines v. IAM*, 1963 U.S. Dist. LEXIS 7156, 54 L.R.R.M. (BNA) 2154 (N.D. Ill. Sept. 5, 1963) (concerted refusal to work overtime, slowdowns and sit-ins violated duty to exert every reasonable effort to settle all disputes and are enjoined).

(ii) indirect evidence indicating involvement by ALPA

The Court finds that the evidence presented that indirectly demonstrates ALPA's complicity in the overtime ban is too attenuated. Delta would have this Court infer that ALPA is encouraging the ban on overtime work when the evidence demonstrates that ALPA is actively informing its members that it is not involved, actively discouraging the ban and

condemning the pilot harassment, while at the same time informing its members of the legal boundaries and ramifications of their actions as well as encouraging them to respect their fellow pilots' choices. The Court finds that Delta is reading too much into the evidence it has presented and finds that this evidence does not support a finding that ALPA was or is involved in the overtime ban. This finding is supported by a letter from Mr. Dave Bushy, Senior Vice President for Flight Operations of Delta, to Mr. Giambusso, dated November 28, 2000, reporting the high number of flight cancellations during November and thanking him for the "support via code-a-phone and printed material on curbing instances of harassment." Additionally, ALPA has presented numerous e-mails and other communications sent by ALPA condemning the overtime ban, condemning pilots harassing other pilots, and urging ALPA members to respect the individual pilot's right to choose whether or not to work. (Giambusso Decl. ¶ 10).

Therefore, although the Court agrees with Delta that the law would be violated if a union is shown to be involved in a concerted effort to ban overtime work, the Court does not find there to be sufficient evidence to link the overtime ban to ALPA.

(iii) ALPA'S liability aside from evidence indicating involvement

Delta next makes the argument that whether or not ALPA is found to be involved in the overtime ban, it has the affirmative duty to end the unlawful activity by its members. Delta cites several of the cases referenced above in support of this proposition: *Trans World Airlines, Inc. v. IAM*, 75 Lab. Cas. (CCH) ¶ 10,312 (W.D. Mo. 1974) (slowdown activity); *Pan Am. World Airways, Inc. v. IUFA*, 1981 U.S. Dist. LEXIS 13669, 93 Lab. Cas. (CCH) ¶ 13,307 (S.D.N.Y. Jul. 20, 1981) (injunction against slowdown). As discussed above, these cases can be distinguished based on the fact that they

both had evidence indicating direct involvement on the part of the union and they often involved situations where the defendant unions refused to take any actions disavowing or discouraging the illegal action. These distinguishing characteristics are even more significant here where Delta is asking the Court to order the union to take affirmative action to ensure that their members are not acting in violation of the law, when there has been no finding of union involvement and there is evidence indicating that ALPA has disavowed and discouraged the activity. This Court will not hold a union liable for the unilateral unlawful actions of its members without evidence indicating the union's involvement as was found in the cases cited by Delta and distinguished by this Court (*see supra*, ¶ (I)(A)(3)(i)). Nor will the Court hold that a union has an affirmative duty to end or prevent the unilateral unlawful activity of its members, especially when there is no finding of involvement on the part of the union and there is evidence that the union has acted to deter unlawful union activity. The facts in this case indicate that ALPA has taken affirmative action not only to inform its members of the possible illegality of their action, but has taken action to discourage unlawful activity.

B. Injunctive Relief Against the Individual Defendants

Delta avers that the individual Defendants have violated the RLA by engaging in a campaign (1) refusing to request overtime for the sole reason of increasing their bargaining power in the ongoing negotiations, (2) encouraging fellow pilots to partake in the overtime ban, and (3) harassing those pilots that do choose to fly overtime. The Court has found that there is an ongoing concerted effort on the part of Delta pilots to refuse overtime work.

The RLA, as described above (*see supra*, ¶ (I)(A)(1)), applies to the union as well as its employees. The RLA states: "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and

maintain agreements . . ." 45 U.S.C. § 152. To this extent, it is clearly a violation of the RLA for the individual pilots to act in such a way so as to be involved in and promote such unlawful activity.

The Court, however, is at a loss, however, as to whom it is to enjoin. Delta has named 49 individual defendants but has not in any form or fashion proven with any specificity the roles these individuals played in the overtime ban. The Court is able to match only one of the individual Defendants to any of the evidence of unlawful activity. Without any specific allegations regarding unlawful activity or evidence implicating the individual Defendants, the Court is unable to enjoin them even though it has found evidence of illegal activity.[5]

CONCLUSION

For the foregoing reasons, the Court DENIES the Motion for a TRO and Motion for a Preliminary Injunction. Nothing in this Order should be read to preclude Delta from reasserting a similar claim for relief should circumstances change such that would merit reconsideration.[6] Nor should this Order be read to absolve ALPA membership from liability as this Court has found that there is evidence of activity that is in violation of the RLA even though such activity has not, as yet, been sufficiently connected to the named Defendants.

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[5] The Court recognizes that crafting an injunction that prohibits activity found to be violative of the RLA while at the same time recognizing the pilots' rights to choose to work overtime or not and the pilots' First Amendment Rights is a delicate proposition.

[6] Obviously the findings in this case are circumscribed by the evidence presented, all in the form of declarations and exhibits. The Court has considered this evidence over the objections of the Defendants who insist that only live testimony should be considered, according to the Norris-LaGuardia Act. 29 U.S.C. §§ 101 *et seq.*

It is so ORDERED this 11th day of December, 2000.

/s/ Willis B. Hunt, Jr.
WILLIS B. HUNT, JR.
Judge, United States District Court

Contract Awareness alpa
2000

Optimizing Our Contract Through Education

#13 Overtime Flying and Overtime Pay

Many new pilots have been added to the seniority list since we last reviewed the various options the Delta Pilots' Working Agreement (PWA) provides for overtime flying. In this season of understaffed categories and 82-hour caps, all pilots should understand the following information.

What Is "Overtime Flying"?: The PWA allows the company to set the monthly cap between 75 and 82 hours. It requires that regular lines be constructed so as not to exceed the cap. It also requires that Scheduling not assign a reserve any flying once he has reached the cap. Any pilot may submit a request to fly additional open time. The type of request submitted determines the treatment of pay and credit time for that flying.

White Slip: A pilot projected below the cap for his or her category may submit a request to fly open time at single pay and credit. The pilot will not be paid premium rates or above the cap in that month. Credit earned in excess of the cap must be either deposited in the bank, or carried forward to the next month as a bow wave. Actual payment for W/S overtime flying will be deferred until such time as the pilot does not fill up in a month. (See *When Scheduling Calls,* p. 19, for a full discussion.)

Green Slip (Regular Line): Any regular pilot may submit a request to fly open time on a G/S. If Scheduling does not have sufficient W/S requests or reserves to fly all open time, G/S volunteers will be awarded flying prior to the inverse assignment of non-volunteers. Once a pilot has accumulated credit equal to the cap, all G/S flying will be at double pay, no credit. Flying on a G/S can result in a pilot's receiving pay

above the cap in that month, and does not result in any time being available for deposit in the bank, or carrying forward in a bow wave. (See *When Scheduling Calls*, p. 22, for a full discussion.)

Green Slip (Reserve Line): The PWA provides for a reserve pilot to submit a G/S for flying on X-days and/or flying after he has reached the cap. However, because of recent changes to FAR Reserve Rest rules, flying on X-days is often not possible for a reserve due to 24-in-7 conflicts with future on-call days. (See *When Scheduling Calls*, p. 22, for a full discussion.)

Inverse Assignment: After all reserves and volunteers have been awarded flying, Scheduling will attempt to cover any remaining open time by assigning pilots on their off days, beginning with the most junior pilot available. This method of covering open time is entirely dependent upon the schedulers being able to notify the pilot of his assignment and receive acknowledgment. Pay for I/A flying is similar to G/S pay. (See *When Scheduling Calls*, p. 22, for a full discussion.)

Green Slip with Conflict: After Scheduling has exhausted all other volunteers and those pilots who may be inversely assigned without a trip conflict, a pilot may be awarded a GSWC that causes him or her to drop flying already on his or her line in order to fly the open time that Scheduling needs to cover. The pilot will be paid for both trips and receive the pay for the GSWC rotation as single pay, no credit, above the cap in that month. (See *When Scheduling Calls*, p. 22, for a full discussion.)

Recommendations

First and foremost, your elected local representatives wish to stress that under the PWA, overtime flying is an individual decision, and no pilot should feel compelled to fly above the cap unless he or she desires to do so. Whether volunteering to fly overtime or being inversely assigned, every pilot should

be aware of his or her absolute obligation not to fly when fatigue would prevent a safe operation. This is especially important to remember in the event of an I/A received via ACARS or in the jetway upon completion of your scheduled rotation.

Your elected representatives recommend that a pilot who desires to work overtime does so for overtime pay, as most other Delta employees do. A green slip will earn premium pay for overtime flying. Flying overtime via a white slip will result in pay at straight rates, and no additional pay, over the cap. When possible, however, it is wise to white slip to or near the cap so as to take full advantage of the double pay; no credit for all-green-slip flying. Any part of the G/S flying that goes toward filling a pilot to the cap is paid just as a white slip is paid.

APPENDIX D

STATUTES

Section 2 First of the Railway Labor Act ("RLA") provides:

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

45 U.S.C. § 152 First.

Section 7 of the Norris-LaGuardia Act ("NLGA") provides:

> No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—
>
> > (a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however*, That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by

the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

29 U.S.C. § 107.

(2)

No. 00-1385

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IN THE

Supreme Court of the United States

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *et al.*,

Petitioners,

v.

DELTA AIR LINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Under Section 2 First of the Railway Labor Act ("RLA"), 45 U.S.C. § 152, First, does the statutory requirement to "exert every reasonable effort" to make and maintain agreements and to settle disputes create an obligation on the part of a union to take reasonable measures to stop its members from engaging in an unlawful job action which has the purpose and effect of disrupting transportation services to the public?

2. When a court is asked to enjoin a job action which is unlawfully disrupting transportation under the Railway Labor Act, based upon documentary evidence of unquestioned authenticity and other undisputed facts, does Section 7 of the Norris LaGuardia Act nonetheless prevent injunctive relief unless live testimony can be taken, if the result is to allow a disruption to air transportation services to continue unabated?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Delta Air Lines, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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Respondent Delta Air Lines, Inc. ("Delta") submits this brief in opposition to the Petition for Writ of Certiorari submitted by the Petitioners Air Line Pilots Association, International, *et al.* ("ALPA").

STATEMENT OF THE CASE

1. The statutory framework. This case arises under the Railway Labor Act (45 U.S.C. §§ 151 to 188). The primary purpose of that Act is "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein." 45 U.S.C. § 151a(1). To achieve this central goal, the Act explicitly compels airlines, their unions, and their employees (1) "to exert every reasonable effort to make and maintain agreements . . . and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier" (45 U.S.C. § 152, First); and (2) to maintain the status quo with respect to "rates of pay, rules, or working conditions" during contract negotiations until the parties have exhausted the Act's bargaining procedures. 45 U.S.C. §§ 155-56.

2. The job action. This case involves a job action by pilots employed by Respondent, Delta Air Lines, Inc. ("Delta"). These pilots are represented for purposes of collective bargaining by Petitioner ALPA. The individual Petitioners are all officers of ALPA and members of its governing body at Delta, the Master Executive Council.

Dissatisfied with the pace of negotiations for a new collective bargaining agreement, in the fall of 2000, a number of Delta's pilots began to act in concert to disrupt Delta's operations through a ban on "overtime" flying in order to force Delta into concessions at the bargaining table. As the

district court observed, the campaign was orchestrated primarily through e-mails and other written communications, which were "explicit as to why the overtime ban [was] encouraged [*i.e.*, to obtain contract concessions from the Company] and how to effectuate it . . . ." Pet. App. 29a, 36a. These communications urged Delta pilots to refrain from various types of overtime flying, to avoid telephone calls from the Company's crew schedulers, and to intimidate and harass those volunteering to fly the "banned" overtime. Pet App. 29a.

3. The litigation. On December 5, 2000, Delta filed a lawsuit and a motion for an emergency injunction in Atlanta against ALPA, 48 named individual pilots (including ALPA's officers) and 200 unnamed pilots (John and Jane Does) in order to stop the job action. A hearing was held on December 6, 2000. Petitioners were represented at the hearing by their regular outside counsel and by local counsel, and a number of the individual Petitioners attended the hearing in person. For several hours, the parties presented argument and introduced extensive written materials, reflecting communications between and among ALPA, its officers, and its members.

Delta argued that ALPA and its officers had been involved in designing and implementing the job action, and introduced documentary evidence to prove the point.[1] Many of the documents relied upon by Delta were e-mail messages posted

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1. For example, Delta pointed to a document written by ALPA's top officer at Delta (the Chairman of the Delta/ALPA Master Executive Council) urging pilots to boycott a particular form of overtime and instructing members on how to avoid crew schedulers calling to give them mandatory assignments. Delta also pointed to an official resolution of one of the local units of ALPA, publicized in an ALPA publication, endorsing a no-overtime campaign. ALPA never disputed the authenticity of these documents.

on an ALPA-sponsored computer-based website accessible only to Delta pilots.[2] Delta argued, however, that regardless of ALPA's role in starting the job action, at a minimum, ALPA had failed, in the language of the statute, "to exert every reasonable effort . . . to avoid any interruption to commerce or to the operation of any carrier. . . ." by failing to condemn the job action vigorously, repudiate the statements and actions of its officials, or investigate and discipline those engaged in the unlawful conduct.

For their part, Petitioners did not submit evidence disputing that a job action by ALPA members was underway, and that the job action was an attempt by ALPA members to apply leverage to the Company during negotiations in aid of ALPA's bargaining position. Petitioners, however, (a) denied that they had any involvement in instigating the job action; and (b) denied that they had any responsibility under the statute even to try to end it. Petitioners also pointed to documents in which (1) ALPA had earlier urged Delta pilots to fly some forms of overtime (the type that would cost the airline the most money); and (2) ALPA repeatedly emphasized that no pilot could be compelled to bid for voluntary overtime.[3]

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2. Some of the messages were signed; others were unsigned or used a pseudonym.

3. Delta's evidence also demonstrated that the job action had forced it to cancel hundreds of flights, stranding or inconveniencing thousands of passengers, doing serious and irreparable damage to Delta and to the traveling public. Although this evidence was not necessary to Delta's request for injunctive relief, *Consolidated Rail Corp. v. RLEA*, 491 U.S. 299, 303 (1989) ("The district courts have subject-matter jurisdiction to enjoin a violation of the status quo pending completion of the required procedures, without the customary showing of irreparable injury"), Petitioners did not seriously contest the evidence.

4. The district court decision. Based upon the documentary evidence in the record, the authenticity of which was never disputed, and upon Petitioners' own admissions, the district court held: (a) that there was an unlawful, "ongoing concerted effort on the part of some Delta pilots to refuse overtime work"; (b) that the job action "has primarily been effectuated through e-mails, many of which rise to the level of intimidation and harassment"; (c) that these efforts were intended "to undermine contract negotiations"; (d) that the job action had cost Delta millions of dollars and that Delta had suffered and was continuing to suffer "immeasurable" damage in terms of the good will of the traveling public; and (e) that the public had suffered an immeasurable loss in time and money from the delays and cancellations. Pet. App. 29a, 36a.

Nonetheless, the district court refused to enter an injunction against Petitioners because, as the court explained, it would not "hold that a union has an affirmative duty to end or prevent the unilateral unlawful activity of its members. . . ." Pet. App. 40a. In so concluding, the court did not mention the RLA's explicit command that the parties "exert every reasonable effort to make and maintain agreements . . . and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier," or, indeed, make any reference to the text of the statute or any case circumscribing the union's "reasonable effort" obligations in this way. Pet. App. 31a. Rather, the court simply observed — inaccurately[4] — that where courts

4. *See American Airlines, Inc. v. TWU*, 45 F.R.D. 1, 3 (N.D. OK. 1968) ("Court is not concerned with their direct involvement . . . [but] only . . . with . . . means to prevent its continuance. . . . [U]nions are responsible when their members unlawfully commit a

(Cont'd)

had enjoined RLA unions in the past, it had been solely on the ground that the union had shared some culpability for instigating the job action.

5. The court of appeals decision. A unanimous panel[5] of the court of appeals reversed. Putting to one side Delta's argument that Petitioners had been actively engaged in planning and implementing the job action, the court stated:

> The district court erred in failing to appreciate the depth and seriousness of the duty to "make and maintain agreements" in a way so as "to avoid any interruption to commerce or to the operation of any carrier." 45 U.S.C. § 152 First. In the instant case, our focus is on ALPA's duty to maintain agreements to avoid interruption of commerce. As the Supreme Court has stated, this

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(Cont'd)

walkout . . . [t]hus, whether these Defendants were directly involved . . . is not an issue . . ."); *REA v. BRAC*, 264 F. Supp. 241 (S.D.N.Y 1967); *REA Express v. BRAC*, 74 L.R.R.M. 2436, 2439 (E.D.N.Y. 1970) (International Union did not authorize strike, and told locals that strike was illegal; nonetheless, it was enjoined to take steps to stop strike and to invoke discipline because it took no action to penalize those responsible for strike and failed to warn members against unauthorized strike); *Long Island R.R. v. System Fed'n*, 289 F. Supp. 119, 125 (E.D.N.Y. 1968) (union enjoined for slowdown and overtime ban, despite arguing that "decline in production . . . is not the result of any action or omission on its part"; "railroad argues that the sharp . . . decline in output . . . is itself evidence of a deliberate slowdown . . . The Court need not be blind to the obvious.")

5. Judges Tjoflat and Barkett of the Eleventh Circuit and Judge Magill of the Eighth Circuit sitting by designation.

> language of the RLA creates a substantive legal duty "enforceable by whatever appropriate means might be developed on a case-by-case basis." *Chicago & N.W. Ry. Co.*, 402 U.S. at 577 . . . An injunction is an appropriate remedy to compel the performance of this legal duty. . . .
>
> The district court's error came in its decision that it would "not hold that a union has an affirmative duty to end or prevent the unilateral unlawful activity of its members." The RLA imposes such a duty on the union in section 152 First, and the district court should have enforced that duty. . . . *22/* . . . The duty of ALPA under the RLA is sufficiently high that even if it has not sponsored or ratified the unlawful job action by the pilots, it has a duty to end such unlawful action.

Pet. App. 16a-19a.

The court also answered Petitioners' contention that live testimony would be required before any injunction could be issued. Relying on settled law from this Court, the court of appeals held that the substantive statutory duty to exert every reasonable effort to make and maintain agreements "take[s] precedence over the more general provisions of the [Norris LaGuardia Act]." Pet. App. 11a. In particular, the court concluded that the live testimony provision was simply irrelevant in the circumstances. The court noted that ALPA never questioned the reliability of the evidence on which the court's decision turned:

> (1) written documents reflecting the pilots' overtime boycott (mainly . . . e-mail communications);

> (2) union pronouncements and directives, which were concededly authentic; (3) statements of union members acknowledging the existence of the overtime boycott, which were concededly genuine; and (4) statistical evidence of the impact of the ban, which was not challenged by ALPA.

Pet. App. 21a.[6] In the absence of any material dispute about the documentary evidence on which the decision turned, the court held, the live testimony provision did not come into play.

Thus, the court ordered that "[u]pon remand, the district court . . . issue appropriate injunctive relief directing ALPA to take further steps to end the pilots' no-overtime campaign. Further steps may include issuing directives as drafted by the court and threatening (or imposing) union sanctions for violations. . . ." Pet. App. 26a. Petitioners' petition for rehearing en banc was denied on February 9, 2001. The district court entered an injunction on February 14, 2001.

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6. As noted *supra* at n.3, the evidence of irreparable harm to which the court referred was not essential to the court's disposition.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW REGARDING THE DUTIES OF RLA UNIONS PRESENTS AN UNEXCEPTIONAL APPLICATION OF SETTLED LAW AND PRESENTS NO ISSUE WORTHY OF REVIEW

Petitioners claim that by relying upon the Railway Labor Act's requirement that the parties must exert every reasonable effort to make and maintain agreements and to settle disputes, the court of appeals departed from this Court's decisions in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 931 (1982) (case not arising under the labor laws); *Carbon Fuel Co. v. UMWA*, 444 U.S. 212, 216 (1979) (case decided under National Labor Relations Act or "NLRA"); and *Coronado Coal Co. v. UMWA*, 268 U.S. 295, 304 (1925) (NLRA case). Petitioners claim these cases stand for the proposition that "membership organizations, including unions, can be held responsible only for their own wrongdoing, not the unauthorized, unratified acts of their members." Pet. 5.

By characterizing the question in this way, Petitioners hope to obscure the question actually posed to the court of appeals in a way that contrives a question worthy of certiorari. In fact, these cases are irrelevant for a variety of reasons

First, the court of appeals did not hold Petitioners "responsible [for] the unauthorized, unratified acts of the[] [union's] . . . members;" it held that Petitioners have *their own duty* to make every reasonable effort to stop the job action which was designed to aid Petitioners' leverage in collective bargaining negotiations. The plain text of the RLA

commands Petitioners to make every reasonable effort to make and maintain agreements and to settle all disputes, the court reasoned, and the evidence indicated that Petitioners failed to do so.

Thus, the court did not, as Petitioners claim, "require[] [them] to 'end' unauthorized employee activity." Pet. 6-7. Indeed, the court recognized the distinct possibility that Petitioners' best efforts ultimately might be insufficient to bring the job action to an end. Pet. App. 19a-20a. If Petitioners were to exert the required effort, but to no avail, the court suggested, Petitioners' statutory duty would have been satisfied, their accountability for the job action would end, and the district court's obligation under the law would then be to fashion an appropriate remedy against the union members engaging in the job action. *Id.*[7]

Second, the cases cited by Petitioners involved damages claims in which the plaintiff sought to impose derivative financial liability on the "organization" for conduct in which the organization was not itself involved. Here, in contrast, only injunctive relief was at issue at this stage of the proceedings — injunctive relief based on the duty of all parties under the RLA to prevent disruptions to the traveling public and to interstate commerce. Neither the district court nor the court of appeals was called upon at this stage of the

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7. Petitioners also argued in the courts below that individual union members cannot be enjoined because they have no legal duty under the RLA in view of the carrier's obligation to deal exclusively with the union in matters relating to collective bargaining. *See Brotherhood of R.R. Trainmen v. Toledo, P.& W. R.R.*, 321 U.S. 50, 61 (1944). Thus, in Petitioners' view, no one could be enjoined, and an unlawful job action which disrupts the traveling public can continue while the courts would be powerless to intercede.

proceedings to address whether, or in what circumstances, Petitioners might be held financially accountable for the job action.

Finally, Petitioners rely almost exclusively on cases decided under the National Labor Relations Act ("NLRA"),[8] a statute which has no language similar to the language of the RLA upon which the decision here was based: the RLA's central imperative that employers, employees, and unions must make every reasonable effort "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein," 45 U.S.C. § 151a(1).[9]

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8. Petitioners also cite a number of NLRA appellate decisions. *North American Coal Corp. v. Local Union 2262, UMWA*, 497 F.2d 459 (6th Cir. 1974); *Philadelphia Marine Trade Ass'n v. Local 1291, ILA*, 909 F.2d 754 (3d Cir. 1990), *cert. denied*, 498 U.S. 1083 (1991); *United Steelworkers v. Lorain*, 616 F.2d 919, 921 (6th Cir. 1980), *cert. denied*, 451 U.S. 983 (1981); *Prater v. UMWA*, 793 F.2d 1201 (11th Cir. 1986). Because they construe a materially different statute and arise in different contexts, they are irrelevant for the reasons given in the text. Petitioners also cite *Fry v. ALPA*, 88 F.3d 831, 842 (10th Cir. 1996), which arose under state tort law, not the Railway Labor Act. *Fry* involved damage claims against ALPA based on violent and threatening conduct by ALPA members. The Tenth Circuit concluded that ALPA *could have been* held liable for damages in that case had the plaintiff shown that ALPA had actual knowledge of the actions of its members and "fail[ed] to take affirmative remedial action," but concluded that the plaintiff had failed to do so in that case.

9. "The fundamental premises and principles of the [RLA] are not the same as those which form the basis" of the NLRA. *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R. Co.*, 353 U.S. 30, 31 (1957).

The NLRA creates "no general anti-strike policy," and, contemplates the "exercise of [] 'economic' weapons" as a central feature of the Act's design.[10] Thus, under the NLRA, a union has no statutory duty to prevent interruptions to commerce or harm to the public interest. *Carbon Fuel, supra.* In contrast the "major purpose of Congress in passing the Railway Labor Act was 'to provide a machinery to prevent strikes.' " *Texas & N.O.R. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 565 (1930). That is why Congress placed at the "heart"[11] of the RLA the duty "to exert every reasonable effort to . . . avoid any interruption to commerce or to the operation of any carrier. . . ." 45 U.S.C. § 152, First. This notion — the affirmative duty of the parties to protect the public interest — is central to the RLA but entirely alien to the NLRA.

Because the opinion below is entirely consistent with the decisions of this court, and creates no division of authority among the circuits, Petitioners are left to complain that as a factual matter, the court of appeals failed to credit all Petitioners claim to have done in their asserted attempt to dissuade ALPA members from the overtime ban. Even if they were correct in this assignment of error (and they are not[12]), the court of appeals' claimed mistake would not

10. *NLRB v. Insurance Agents*, 361 U.S. 477, 510 (1960).

11. *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-78 (1969).

12. For example, when, as mentioned above, the Dallas-Fort Worth (DFW) unit of ALPA passed a resolution endorsing the overtime ban, ALPA never repudiated the resolution or disciplined — or even corrected — the union officials responsible; when the Chair of the DFW unit sent a letter to a list of ALPA officials and (Cont'd)

warrant review by this Court. No broad principle of law would be implicated by that question, and no issue of national importance hinges upon its resolution. Supreme Court Rule 10(a). "It is . . . axiomatic that this Court cannot devote itself to error correction. . . ." *Calderon v. Thompson*, 523 U.S. 538, 569 (1998). There is no issue worthy of certiorari here.[13]

II. NO SIGNIFICANT ISSUE FOR REVIEW IS PRESENTED AS TO THE ISSUANCE OF AN INJUNCTION WITHOUT "LIVE TESTIMONY"

The court of appeals held that Section 7 of the Norris LaGuardia Act, 29 U.S.C. § 107, does not obligate a trial court to hold an evidentiary hearing before issuing an RLA status quo injunction if the injunction is warranted on a stipulated or uncontested set of facts. This holding was entirely unexceptional and in line with all of the relevant authority. Although Petitioners contrive to demonstrate a

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(Cont'd)
members suggesting that a "grassroots" overtime ban was "probably legal," ALPA did not correct or repudiate the statement or discipline the official involved; and when two ALPA members sent an e-mail to several dozen pilots (including MEC members) encouraging the overtime ban, ALPA did not repudiate the e-mail or discipline those involved.

13. Because the litigation here has not proceeded beyond the stage of preliminary injunction, grant of certiorari could lead to fragmented litigation and piecemeal review. A different legal issue will be presented if Delta, in the permanent injunction proceeding, ultimately succeeds in proving that ALPA's statements in regard to the pilots' overtime ban amounted to ratification. Still another legal issue will be presented if ALPA's exercise of every reasonable effort to curb the overtime ban is unsuccessful, and the courts below approve an injunction against individual pilots.

split in the circuits on the issue, a review of the cases cited by Petitioners demonstrates that none exists.

The Third Circuit in *United Tel. Workers v. Western Union Corp.*, 771 F.2d 699 (3d Cir. 1985) (a case arising under the National Labor Relations Act), expressly acknowledged the rule applied in other circuits — that no live testimony is required "where the relevant facts are undisputed or would not be enlightened by oral testimony." *Id.* at 705. Similarly, in *UAW v. LaSalle Mach. Tool, Inc.*, 696 F.2d 452, 456-458 (6th Cir. 1982) (also an NLRA case), the court held only that "when the allegations of a complaint seeking an injunction are denied by the defendant, the defendant is entitled to a hearing on *controverted facts* as well as upon questions of law." *Id.* at 457 (emphasis added). Finally, in *In re District No. 1-Pacific Coast Dist., Marine Eng'rs Beneficial Ass'n*, 723 F.2d 70, 77 (D.C. Cir. 1983) (yet another NLRA case), the district court had failed to comply with *any* of the relevant NLGA requirements — failing even to make findings of fact — because it was wrongly operating on the assumption that it was issuing a TRO rather than a preliminary injunction.

None of these cases, then, requires live testimony where the material facts are drawn from documents of unchallenged authenticity. On this question — the one presented below — the court of appeals' decision was consistent with every reported appellate decision on point. *See Railway Express Agency, Inc. v. Brotherhood of Railway, Airline & Steamship Clerks*, 437 F.2d 388 (5th Cir.) (RLA case; where the few disputed facts were not material to the propriety of an injunction, no live testimony required), *cert. denied*, 403 U.S. 919 (1971); *see also Local Lodge No. 1266 v. Panoramic Corp.*, 668 F.2d 276 (7th Cir. 1981) (NLRA case; no live

testimony where relevant facts are essentially undisputed); *Drywall Tapers & Pointers v. Operative Plasterers' and Cement Masons' Int'l Ass'n*, 537 F.2d 669 (2d Cir 1976) (NLRA case; injunction properly issued where both sides submitted extensive affidavits and documents and the primary issue — the meaning of a contract — was not one on which testimony would have aided the court); *Hoh v. Pepsico, Inc.*, 491 F.2d 556 (2d Cir. 1974) (NLRA case; noting in *dicta* that injunction could properly be issued where necessary facts are undisputed).

In this case, "both sides presented sworn affidavits and a host of other evidence and testimony." Pet. App. 21a. Delta offered to put on its declarants as live witnesses, but the district court decided to proceed without live testimony. "[Delta's] evidence was largely undisputed — particularly as it related to the fact that the pilots were undertaking concerted action." *Id.* "Given that there was no dispute about the reliability of the evidence, at least as to the concerted action by the pilots, we believe the district court was entitled to rely upon such evidence to make its determinations."[14] *Id.*

Indeed Petitioners identify only one factual dispute as to which they assert oral testimony should have been taken: whether more vigorous efforts by ALPA "[w]ould have affected the amount of voluntary overtime flying the pilots performed." Pet. 10. Petitioners again miscast the holding

14. On the other hand, the court recognized the limits of its conclusion: "We do not pass judgment at this time as to whether there was reliable and undisputed evidence about ALPA's involvement in the no-overtime campaign. There appears to be a genuine dispute over ALPA's involvement sufficient to necessitate live testimony as contemplated by the NLGA, 29 U.S.C. § 107." Pet. App. 26a.

of the court of appeals. The court did not, as Petitioners suggest, impose upon ALPA strict liability for the conduct of its members; it simply recognized ALPA's legal duty to make every reasonable effort, as the members' exclusive bargaining representative, to prevent its members from engaging in illegal concerted activity in aid of ALPA's bargaining power. Even assuming that ALPA had offered to provide testimony to the effect that its efforts would not have succeeded (and, significantly, Petitioners did not claim at the district court hearing to have any such evidence, or claim that they wanted time to obtain it), it would not have mattered to the disposition of the issue. Petitioners' statutory obligation, the court held, was to *try* to end the job action, not to succeed.

Petitioners' real complaint is that the court of appeals erred in deciding that all the relevant facts were undisputed. Even if this conclusion was erroneous (and it plainly was not), no question warranting certiorari would be presented. This Court does not generally concern itself with the misapplication of accepted legal standards to the facts of particular cases. The Court "does not sit primarily to correct what [it] perceives[s] to be mistakes committed by other tribunals." *Watt v. Alaska*, 451 U.S. 259, 275 (1981) (Stevens, J., concurring). As previously noted, "[i]t is . . . axiomatic that this Court cannot devote itself to error correction. . . ." *Calderon v. Thompson*, 523 U.S. 538, 569 (1998); *see also Anderson v. Harless*, 459 U.S. 4, 12 (1982) (Stevens, J., dissenting) ("[i]t is not appropriate for this Court to expend its scarce resources crafting opinions that correct technical errors in cases of only local importance where the correction in no way promotes the development of the law").

CONCLUSION

The petition should be denied.

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IN THE

Supreme Court of the United States

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *et al.*,
Petitioners,

v.

DELTA AIR LINES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

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Petitioners Air Line Pilots Association, *et al.* ("ALPA") respectfully submit this reply to the Brief In Opposition ("Br. Opp.") of Respondent Delta Air Lines, Inc. ("Delta").

I. THE ELEVENTH CIRCUIT SPLIT FROM OTHER CIRCUITS IN HOLDING THAT A UNION HAS AN AFFIRMATIVE OBLIGATION TO END UNAUTHORIZED, UNRATIFIED EMPLOYEE CONDUCT

Under the Norris-LaGuardia Act ("NLGA"), a union cannot be enjoined absent clear proof of its having authorized, participated in or ratified unlawful employee conduct. *See* 29 U.S.C. § 107(a) (court may only enjoin union for engaging in unlawful conduct or "actually authorizing or ratifying" it); *id.* § 106 (to hold union responsible or liable for acts of members requires "clear proof" of union's actual authorization, participation or ratification). The district court below found that ALPA did not ratify the pilot no-overtime campaign, *see* App. 30a, 40a, and the court of appeals did not disturb this finding, *see* App. 18a. Nonetheless, the appeals court found that simply avoiding ratification under the NLGA standard was not enough: "The duty of ALPA under the [Railway Labor Act ("RLA")] is sufficiently high that *even if it has not sponsored or ratified* the unlawful job action by the pilots, it has a *duty to end* such unlawful action." App. 19a n.22 (emphasis added). Indeed, even though the RLA requires only a "reasonable effort" by unions to make and maintain agreements, 45 U.S.C. § 152 First, the court of appeals held that ALPA "is statutorily bound to do *everything possible* to maintain' the [collective bargaining agreement] so that commerce is not in any way interrupted." App. 18a (emphasis added).

After the court of appeals decision issued in this case, the Seventh Circuit, in a March 14, 2001 decision, split from the Eleventh Circuit, expressly applying the NLGA authorization or ratification standard to determine whether a union can be

enjoined under the RLA for an unlawful employee job action. *See United Air Lines, Inc. v. International Ass'n of Machinists & Aerospace Workers*, 166 L.R.R.M. (BNA) 2769, 2779-80 (7th Cir. 2001) (applying NLGA §§ 6, 7(a)). The Seventh Circuit relied, *see id.* at 2779, on its earlier decision in *Air Line Pilots Association v. United Air Lines, Inc.*, 802 F.2d 886, 905 (7th Cir. 1986), which held that a union can not be liable for violation of the RLA based on an employee "sick out" unless the carrier satisfies the NLGA § 6 standard by showing clear proof of the union's involvement. The Seventh Circuit has thus joined the Tenth Circuit in holding that the NLGA authorization-or-ratification standard sets the outer limits of a union's obligations in the face of unlawful employee conduct. *See Fry v. Airline Pilots Ass'n Int'l*, 88 F.3d 831, 842 (10th Cir. 1996) (NLGA standards "establish a congressionally mandated restrictive test of union responsibility for unlawful acts").[1]

Cases from the Third and Sixth Circuits, too, hold, in opposition to the Eleventh Circuit decision here, that a union cannot be held responsible for unlawful job actions that it did not sponsor or ratify. *See Philadelphia Marine Trade Ass'n v. Local 1291, Int'l Longshoremen's Ass'n*, 909 F.2d 754, 758-59 (3d Cir. 1990) (holding, based on NLGA requirements, union may not be enjoined for wildcat strike it did not ratify); *United Steelworkers v. Lorain*, 616 F.2d 919, 921-24 (6th Cir. 1980) (applying NLGA standard to hold union not liable for strike it

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[1] Delta cites *Fry* for the proposition that a union can be held responsible for failing, in the face of unlawful employee conduct, to take "affirmative remedial action." Br. Opp. at 10 n.8 (quoting *Fry*'s discussion, 88 F.3d at 842, of *Yellow Bus Lines, Inc. v. Local Union 639*, 883 F.2d 132, 136 (D.C. Cir. 1989)). ALPA does not dispute that the ratification standard of the NLGA may, in appropriate circumstances, require affirmative action by the union. *See Yellow Bus Lines*, 883 F.2d at 136; *Prater v. UMW*, 793 F.2d 1201, 1210 (11th Cir. 1986); *U.S. Steel Corp. v. UMW*, 598 F.2d 363, 365 (5th Cir. 1979). The court of appeals in this case, however, imposed a duty on ALPA *beyond* the ratification standard, requiring it to end the employee conduct. App. 19a n.22.

did not ratify). Delta argues these cases are inapt because they arise under the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151 *et seq.*, a statute which, Delta asserts, imposes on a union no duty to prevent interruptions to commerce. *See* Br. Opp. at 11. On the contrary, the NLRA, which aims to "safeguard[ ] commerce from injury, impairment, or interruption," 29 U.S.C. § 151a, more strictly confines a union's use of economic weapons than does the RLA.[2] Under the NLRA, when, as in *Philadelphia Marine*, 909 F.2d at 756-57, and *Lorain*, 616 F.2d at 920, a union is party to a collective bargaining agreement containing a no-strike clause, it has an affirmative duty to refrain from striking and a violation of that duty may, under appropriate circumstances, be enjoined. *See Boys Market, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970). Thus, the issue in both *Philadelphia Marine* and *Lorain* was the same issue in the instant case: the extent of the union's affirmative duty if employees engage in an unauthorized illegal job action. The Third and Sixth Circuits held that the union has responsibility only to take such steps as necessary, under the NLGA standard, to avoid ratifying the job action, while the Eleventh Circuit in this case expressly held that the union's obligation extends further, having a duty not only to do *everything possible*, but a duty *to end* the job action. *See* App. 18a, 19a n.22. Nothing in the RLA or any prior caselaw supports this Eleventh Circuit determination.

Delta also argues that no conflict exists between the Eleventh Circuit decision and cases from other circuits because the instant

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[2] As the Court has explained, the RLA "provide[s] greater avenues of self-help ... than would be available under the NLRA, " *Trans World Airlines v. Independent Fed'n of Flight Attendants*, 489 U.S. 426, 439 (1989), including secondary picketing, *see Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employes*, 481 U.S. 429 (1987), and intermittent strikes, *see Pan Am World Airways v. IBT*, 894 F.2d 36 (2d Cir. 1990); *see also CSX Transp. v. Marquar*, 980 F.2d 359 (6th Cir. 1992) (unlike NLRA, RLA provides no damages remedy for unlawful strike).

case only involves a preliminary injunction, not damages. *See* Br. Opp. at 9-10. But the Seventh Circuit's *United Air Lines* case, 166 L.R.R.M. at 2770, and the Third Circuit's *Philadelphia Marine* case, 909 F.2d 755, were also limited to requests for a preliminary injunction. Moreover, the NLGA standard applies in injunction as well as damages proceedings. *See* 29 U.S.C. § 107(a); *United Air Lines*, 166 L.R.R.M. at 2779-80. Regardless of the remedy sought, the issue is the same: whether a union's obligation in the face of a wildcat job action is to end it, by doing everything possible, as the Eleventh Circuit held, or to take such appropriate steps so as not to ratify the employees' action, as every other circuit ruling on the issue has held.[3]

Delta posits a meaningless distinction by arguing that the issue is not whether ALPA can be held to answer for the employees' conduct but is rather the extent of the union's *own*

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[3] Delta cites cases in which it claims a union has been enjoined under the RLA without any basis for a finding that the union instigated the job action. *See* Br. Opp. 4 n.4. Delta mischaracterizes these cases. In three of the cited cases, all or virtually all of the union members struck or otherwise engaged in a job action. *See American Airlines, Inc. v. Transport Workers Union*, 45 F.R.D. 1, 2 (N.D. Okla. 1968) ("Nearly all of the members of the Defendant local union walked off their jobs . . . . "); *Railway Agency Express, Inc. v. Empire City Lodge 2035*, 264 F. Supp. 241, 243 (S.D.N.Y. 1967) ("all but a handful of the 1,300 odd drivers" failed to report for work); *Long Island R.R. v. System Fed'n No. 156*, 289 F. Supp. 119, 125 (E.D.N.Y. 1968) ("refusal of *all* members of the union to perform any *overtime* work") (emphasis added). Such mass action creates a basis for finding union culpability. *See Eazor Express, Inc. v. International Brotherhood of Teamsters*, 520 F.2d 951, 963 (3d Cir. 1975) ("mass action by union members must realistically be regarded as union action"); *cf.* App. 36a (finding only "some" Delta pilots involved in no-overtime campaign). In the fourth case, the issue was not whether a union could be held responsible for employee conduct but whether a parent union could be held responsible for the conduct of its local union, an issue, the court noted, not governed by the NLGA. *REA Express v. Brotherhood of Ry., Airline & S.S. Clerks*, 74 L.R.R.M. (BNA) 2436, 2439-40 (E.D.N.Y. 1970).

duty under the RLA. *See* Br. Opp. at 8. If, as the court of appeals held, ALPA has a duty to end an employee job action, and then, as here, is enjoined for failing to fulfill that duty, the effect is that ALPA is being made to answer for the continuance of the unauthorized employees' conduct.

Because the Eleventh Circuit decision is at odds with other circuits on an issue of pressing national importance to labor relations in the transportation industry, the petition should be granted.[4]

II. THE ELEVENTH CIRCUIT SPLIT FROM OTHER CIRCUITS IN DISREGARDING THE LIVE TESTIMONY REQUIREMENT SET OUT IN THE PLAIN LANGUAGE OF THE NLGA

Delta does not and cannot dispute that the plain language of NLGA Section 7 sets forth a *jurisdictional* requirement that a federal court only issue an injunction in a labor dispute "after hearing the testimony of witnesses in open court (with opportunity for cross-examination)." 29 U.S.C. § 107. Nor can Delta dispute that, unlike the Eleventh Circuit in this case, other circuits have upheld the plain meaning of the statute. *See United Tel. Workers v. Western Union Corp.*, 771 F.2d 699, 703 (3d Cir. 1985); *In re District No. 1—Pacific Coast Dist. Marine Eng'rs Beneficial Ass'n*, 723 F.2d 70, 77 (D.C. Cir. 1983); *UAW v. LaSalle Mach. Tool, Inc.*, 696 F.2d 452, 456-57 (6th Cir. 1982).

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[4] Delta argues that ALPA is actually only challenging the court of appeals' "fail[ure] to credit all Petitioners claim to have done in their asserted attempt to dissuade ALPA members from the overtime ban." *See* Br. Opp. at 11. ALPA makes no such challenge. Indeed, the appeals court left undisturbed the district court's finding that ALPA did not ratify the job action. The petition, rather, seeks review of the legal determination of the appeals court, which radically expands the scope of a union's duty beyond the NLGA ratification standard to a standard that virtually imposes strict liability on the union for unauthorized, unratified employee conduct.

In defending the Eleventh Circuit's decision, Delta argues that live testimony is not required when a case presents no dispute of fact. Br. Opp. 12. The instant case, however, did present a central factual issue. The district court hearing addressed only the issue of "whether ALPA actively sponsored or ratified the pilots' no-overtime campaign, " App. 21a, but in reversing, the Eleventh Circuit changed the applicable legal standard. Ruling that ALPA had an affirmative obligation that extended beyond avoiding ratification under the NLGA, App. 19a n.22, the court of appeals created a factual issue, not addressed in the district court, as to whether "ALPA has in fact done all that it can do," App. 18a, to end the pilot job action. What further steps ALPA could have taken effectively to increase the amount of *voluntary* pilot overtime flying is a disputed, fact-bound question that, under the NLGA, should have been resolved by a hearing with live testimony prior to the issuance of an injunction against ALPA.

Delta claims that the appeals court did not require ALPA to end the job action but only that ALPA had an obligation to make reasonable efforts to try to end it. Br. Opp. at 15. Even if true, live testimony was still required; what is reasonable depends on the factual circumstances of the case. *See Monterey v. Del Monte Dunes*, 526 U.S. 687, 721 (1999) (question of reasonableness essentially fact-bound).

Delta claims too that ALPA never sought live evidence in the district court on the issue of the reasonableness of its efforts to end the job action. Br. Opp. at 15. This issue, however, arose only at the end of the lower court hearing and was dealt with by the lower court through post-hearing briefs, without providing an opportunity for the presentation of live testimony or cross-examination.

In any event, even in a case that appears to present no disputed facts, the plain language of the NLGA allows no exception to the live testimony rule. The statute provides that in "*any* case involving or growing out of a labor dispute" the court

only has jurisdiction to issue an injunction after hearing "the testimony of witnesses in open court (with opportunity for cross-examination). " *See* 29 U.S.C. § 107 (emphasis added). A court has no authority to expand its jurisdiction by crafting a exception to this statutory mandate.

In support of such an exception, Delta cites cases that are distinguishable from the instant one. *See Local Lodge No. 1266 v. Panoramic Corp.*, 668 F.2d 276, 290 (7th Cir. 1981) (no live testimony because "time was of the essence"); *Railway Express Agency, Inc. v. Brotherhood of Ry., Airline & S.S. Clerks*, 437 F.2d 388, 395 (5th Cir. 1971) (union waived oral testimony). But even if the cases Delta cites could be construed to create an exception to the live testimony rule when there are no disputes of fact, other circuits have remained faithful to the statutory language and not adopted such an exception. *See, e.g., United Tel. Workers*, 771 F.2d at 705; *Marine Engineers'*, 723 F.2d at 77 ("We cannot countenance any deviation from the Act"). The result is a split in the circuits on a significant matter of statutory interpretation that should be resolved by this Court.[5]

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

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[5] Delta argues that because the petition only concerns the preliminary injunction, and the underlying litigation may continue, certiorari should be denied, as granting it could lead to piecemeal review by the Court. Br. Opp. 12 n.13. The issue presented, however, is ripe for review and there is no reason to expect that further litigation of the case will raise any other issues warranting Supreme Court review. Moreover, having taken an interlocutory appeal from the district court' s denial of its preliminary injunction motion, Delta should not be heard to object to this Court reviewing the same interlocutory matter.

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